Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RAYMOND L. SMITH, JR.
REGAL CINEMAS, INC
7132 Regal Lane
Knoxville, TN 37918

LAURA M. FRANZE
Counsel of Record
AKIN GUMP STRAUSS
HAUER & FELD LLP
1700 Pacific Avenue
Suite 4100
Dallas, TX 75201
(214) 969-2800

Counsel for Petitioners

183648

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether, in movie theaters with 300 or fewer seats, wheelchair seating located amidst or adjoining general public seating and providing unobstructed views of the screen complies with the Americans with Disabilities Act and the "lines of sight comparable" component of Section 4.33.3 of its enabling regulations?

2. Whether a court should accord "controlling deference," or any deference, to an administrative agency's after-the-fact interpretation of a regulation, when the interpretation imposes new obligations not clear from the face of the regulation, and is adopted without the notice and comment procedures contemplated by the Administrative Procedure Act?

3. Whether an administrative agency's after-the-fact interpretation of a regulation that imposes new obligations not clear from the face of the regulation, and is adopted without the notice and comment procedures contemplated by the Administrative Procedure Act, may be enforced retroactively?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding whose judgment is sought to be reviewed are Regal Cinemas, Inc., Eastgate Theatre, Inc., Kathy Stewmon, Tina Smith, and Kathy Braddy. Oregon Paralyzed Veterans of America, a plaintiff below, is no longer a party to this proceeding.

Petitioners, Regal Cinemas, Inc. and Eastgate Theatre, Inc., are both ultimately owned by Regal Entertainment Group, which is publicly traded.

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Petitioners, Regal Cinemas, Inc. and Eastgate Theatre, Inc. (collectively "Regal"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on August 13, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported at *Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), and is reprinted in the Appendix to this Petition ("App.") at App. 1a. The opinion of the United States District Court for the District of Oregon (King, J.), which was reversed by the Ninth Circuit, is reported at *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293 (D. Or. 2001), and is reprinted at App. 27a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 13, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (2000).

STATUTES INVOLVED

Pertinent provisions of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000), and the Americans with Disabilities Act Accessibility Guidelines, 28 C.F.R. pt. 36, app. A (2003), are set forth at App. 40a.

STATEMENT OF THE CASE

The decision below creates conflict among the circuits on a matter of federal law and puts builders, owners, and operators of places of public accommodation across the nation "in a position of impossible uncertainty." *Stewmon*, 339 F.3d at 1134, App. 18a (Kleinfeld, J., dissenting). As acknowledged in both the majority and dissenting opinions, the decision below directly conflicts with the United States Court of Appeals for the Fifth Circuit's holding in *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), regarding an interpretation of Title III of the ADA and its enabling regulations. *See Stewmon*, 339 F.3d at 1133 n.9, App. 15a (B. Fletcher, J.); *id.* at 1133, App. 18a (Kleinfeld, J., dissenting).

Prior to the popularization of stadium-style movie theaters, most movie theaters relied on gently sloping floors to provide theater-goers with (sometimes less than clear) sightlines over forward sitting patrons. Wheelchair spaces in traditional style theaters were typically located at the rear of the auditorium, near the entrance. This location was considered ideal because the accessibility regulations require that wheelchair spaces must, for safety reasons, be located on a level surface with accessible egress.

In 1995, one of Regal's competitors opened the first stadium-style movie theater. Stadium-style design theaters eliminate "obstructed view" problems that occur, for example, when a tall individual sits in front of a shorter person. In most of the theater, the incline required to provide completely unobstructed sightlines is well over five percent, far greater than what can reasonably be accomplished with a sloped floor. Steps are therefore inherent to the stadium design. As with traditional slope theaters, wheelchair spaces in stadium style theaters are located on level floor, near the entrance, and adjoining an accessible route. All wheelchair seating locations in stadium-style theaters, like the seats for the general public, provide clear and unobstructed views of the movie screen, and either adjoin or are amidst seating for the general public.

As stadium-style movie theaters gained in popularity with the theater-going public, Regal, and virtually every other major movie theater operator, responded to the demand by building stadium-style multiplexes. Between 1995 and July of 1998, hundreds of similarly designed stadium-style movie theaters were built, inspected, and opened for business.

The underlying lawsuit challenged the placement of wheelchair seating locations in six Regal "stadium-style" movie theater multiplexes in the Portland, Oregon area as violating Section 4.33.3 of the ADA Accessibility Guidelines. The district court below granted summary judgment in favor of Regal. *OPVA*, 142 F. Supp. 2d at 1294, App. 27a. The DOJ appeared as *amicus curiae* on appeal in the Ninth Circuit, urging deference to an interpretation of Section 4.33.3 that would impose, among

other things, new "viewing angle" standards for wheelchair seating locations.[1] The DOJ argued that viewing angles for wheelchair seating must be "equivalent or better than the viewing angles [provided] . . . to a majority" of the public. Relying on the DOJ's interpretation, a divided Ninth Circuit reversed the district court and remanded the case with instructions to enter summary judgment against Regal. The Ninth Circuit thereby imposed construction obligations not found in the language, history, or past application of the regulation. The majority opinion means that thousands of movie theaters that were built without notice of the DOJ's interpretation, and in compliance with the law according to the best knowledge of design professionals at the time, must now be destroyed or expensively retrofitted.

The decision below also creates and perpetuates conflict among the lower courts regarding the degree of deference, if any, that should be given to an agency's after-the-fact interpretation of a regulation when the interpretation imposes new obligations not clearly articulated in the language of the regulation and is adopted without following notice and comment procedures. The conflict reflects a fundamental, persistent, and recurring problem that necessarily transcends any single statute or regulatory scheme.

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1. While the ADAAG was promulgated in 1991, the DOJ did not announce its interpretation of Section 4.33.3 until July of 1998. Between 1991 and July 1998, the DOJ never indicated that Section 4.33.3 could be interpreted to impose a "viewing angle" requirement in small assembly areas of 300 seats or less. The Ninth Circuit majority described DOJ's interpretation as requiring theaters to "provide wheelchair users with lines of sight within the range of viewing angles offered to most patrons." *Stewmon*, 339 F.3d at 1130, App. 10a-11a. The Access Board previously described DOJ's interpretation as requiring viewing angles for wheelchair seating that must be "equivalent or better than the viewing angles . . . provided by 50 percent of the seats in the auditorium, counting all seats of any type sold." *See* ADAAG Proposed Rules, 64 Fed. Reg. 62,248, 62,278, App. 47a-48a (Nov. 16, 1999) (codified at 36 C.F.R. pt. 1190 & 1191).

A. Title III Of The ADA And The ADA Accessibility Guidelines.

Title III of the ADA requires that places of public accommodation meet certain accessibility design guidelines. Accessible design implicates fundamental structural, architectural, engineering, and safety considerations that must be addressed well before construction begins. One court concisely described why:

> Constructing a stadium or arena is an expensive, complex affair. If the law is to impose certain requirements to assist those with disabilities and to impose an obligation to make expensive retrofits if that law is violated, it is essential that those requirements be clearly articulated in the regulations.

Caruso v. Blockbuster-Sony Music Entm't Ctr., 968 F. Supp. 210, 216 (D.N.J. 1997), *aff'd in relevant part*, 193 F.3d 730 (3d Cir. 1999).

Both the language and legislative history of Title III evidence Congress's intent that builders, owners, and operators of places of public accommodation receive full and fair notice of what is required under the law. Congress instructed the DOJ to set accessibility standards "consistent with the minimum guidelines and requirements issued by the [Access Board]." 42 U.S.C. § 12186(c), App. 41a.[2] Notice was so important that Congress set a deadline for the DOJ to enact regulations so that builders, owners, and operators would have significant advance notice of their construction obligations. *See* 42 U.S.C. § 12186(d)(1), App. 41a-42a.

The Access Board developed the underlying regulations deliberately and with the input of all affected parties. On January 22, 1991, it published a notice of proposed rulemaking, requesting comments on its proposed guidelines. 56 Fed. Reg. 2,296 (Jan. 22, 1991). Over the next six months, the Access

2. The Access Board is a federal agency created under the Rehabilitation Act of 1973. It is comprised of 25 members, including representatives from the DOJ and other federal agencies. 29 U.S.C. § 792(a)(1) (2000).

Board held fourteen public hearings, took testimony from 450 witnesses, received 1,865 written comments, and considered over 12,000 pages of material. *See* ADAAG Final Guidelines, 56 Fed. Reg. 35,408, 35,409 (July 26, 1991). The resulting regulations, called the ADA Accessibility Guidelines for Buildings and Facilities, are minutely detailed and precise. *See, e.g.*, 56 Fed. Reg. 35,408; 28 C.F.R. pt. 36, app. A (2003).[3] The DOJ adopted the ADAAG verbatim in 1991 without further notice and comment. *See* 56 Fed. Reg. 35,544, 35,586 (July 26, 1991).

B. Section 4.33.3 Of ADAAG.

Section 4.33.3 of ADAAG sets forth accessibility guidelines for "assembly" seating. Like all other ADAAG provisions, Section 4.33.3 was adopted by the DOJ in 1991 exactly as drafted by the Access Board, and no changes have been made to the regulation since it was adopted. Section 4.33.3 provides, in relevant part, as follows:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as means of egress in case of emergency. . . . When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. . . .
>
> EXCEPTION: Accessible viewing positions may be

3. There are literally hundreds of detailed ADAAG requirements, covering such things as the placement, width, height, and depth of doorways, aisle and ramp access, toilets, telephones, water fountains, emergency equipment, counter height, audio enhancements, parking, outside access, and other things. *See, e.g.*, ADAAG §§ 4.4.1 (objects protruding from walls must be no more than four inches long); 4.5.3 (carpet pile thickness must be less than one-half of an inch); 4.19.2 (counter surfaces of lavatories must be no more than 34 inches from floor); 4.32.4 (tables and counters must be between 28 and 34 inches from floor).

> clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than five percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

28 C.F.R. pt. 36, app. A at § 4.33.3, App. 45a.

C. Stadium-Style Movie Theaters, Nationwide Construction, And Belated DOJ Interpretations.

In 1995, four years after the ADAAG was promulgated, one of Regal's competitors opened the first stadium-style movie theater in the United States. This architectural design combines rows of tiered seating that rise at a slope of well over five percent with rows of traditional sloped-floor seating. This elevated seating configuration eliminates "obstructed view" problems that occur, for example, when a tall individual sits in front of a shorter person. Because of the steep grade inherent to this multi-step design, individuals using wheelchairs generally cannot navigate the tiered seating rows. Accordingly, in stadium-style movie theaters with 300 seats or less, such as the theaters at issue in this lawsuit, wheelchair seating is located within the first five rows of each auditorium, directly in front of the tiered seats, and near entranceways and exits.[4] All wheelchair seating locations provide wheelchair-using patrons with clear and unobstructed views of the movie screen, and either adjoin or are amidst seating for the general public.

The public embraced this new movie theater design and virtually every major movie theater operator responded to the demand by building stadium-style multiplexes in locations across the United States. Between 1995 and July of 1998, hundreds of similarly designed stadium-style movie theaters were built, inspected, and opened for business.[5]

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4. In stadium-style movie theaters with 300 or more seats, wheelchair seating is "dispersed" in accordance with Section 4.33.3 to at least two areas of the movie theater. *See* ADAAG § 4.33.3, App. 45a.

5. During the inspection process, the wheelchair seating locations at stadium-style movie theaters owned by Regal and others were approved as "accessible" by state, local, and city officials under (Cont'd)

In July of 1998, more than seven years after Section 4.33.3 was promulgated, and more than three years into the most prolific period of construction in the history of the movie theater industry, the DOJ filed an *amicus curiae* brief in a private plaintiff lawsuit in El Paso, Texas proclaiming, for the first time, that it "interpreted" Section 4.33.3's "lines of sight comparable" language to impose a "viewing angle" requirement, and that this "interpretation" was deserving of deference. This event marked the first of many variations of the "viewing angle" requirement "interpreted" from Section 4.33.3 by the DOJ. Soon thereafter, the DOJ filed lawsuits against several national movie theater companies, including AMC, Cinemark, Hoyts Cinemas, National Amusements, and Sanborn Theaters, based on variations of its "viewing angle" interpretation of Section 4.33.3.[6] At the same time, the DOJ began making *amicus curiae* appearances to advance still more variations of its "viewing angle" interpretation in private plaintiff lawsuits against national movie theater companies Regal, Cinemark, and Hoyts Cinemas.[7]

(Cont'd)
accessibility codes that are identical in pertinent part to Section 4.33.3. For example, the wheelchair seating locations at the Regal stadium-style movie theaters challenged in this case were determined to be compliant with a "lines of sight comparable" provision in Oregon Uniform Building Code § 1109.20.1.1. Similar designs were also approved under state accessibility codes expressly certified by the DOJ as "meeting or exceeding" federal standards. For example, Cinemark USA, Inc. obtained numerous pre- and post-construction approvals signifying that similar wheelchair seating locations in its stadium-style movie theaters complied with the "lines of sight comparable" requirement of Texas Accessibility Standard 4.33.3, which was certified by the DOJ in 1996. *See United States v. Cinemark USA, Inc.*, No. 1:99 CV-705, Mem. Op. & Order at 11, App. 61a (N.D. Ohio Nov. 19, 2001).

6. The DOJ urged variations of its "viewing angle" interpretation in settlement discussions as well. *See* ADAAG Proposed Rules, 64 Fed. Reg. 62,248, 62,278, App. 47a.

7. The DOJ's interpretation of Section 4.33.3 has been in a state of continuous evolution in the five years since it was first articulated in 1998. The DOJ told the Western District of Texas that wheelchair
(Cont'd)

D. Acknowledgements By The Access Board In 1999 And 2002 That Section 4.33.3 Would Require Additional Language To Create A "Viewing Angle" Requirement.

On November 16, 1999, the Access Board published a Notice of Proposed Rulemaking concerning several proposed ADAAG revisions. *See* 64 Fed. Reg. 62,248, App. 46a-47a. As part of that process, the Access Board discussed possible revisions to Section 4.33.3, and remarked that it was aware that the DOJ had asserted in litigation that Section 4.33.3 imposed certain "viewing angle" requirements. The Access Board stated that it was "*considering* whether to include specific requirements in the final rule that are consistent with DOJ's interpretation of [Section] 4.33.3 to stadium-style movie theaters." *Id.*, App. 48a (emphasis added).

E. The District And Appellate Court Rulings Below.

On April 11, 2000, Kathy Stewmon, Tina Smith, and Kathy Braddy (collectively designated as "Stewmon") filed suit in the

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(Cont'd)

positions must offer sight line angles measured from the wheelchair seating locations to the top of the movie screen that do not exceed 35 degrees. Brief of *Amicus Curiae* United States on Summary Judgment Issues at 4, 8-9, *Lara v. Cinemark USA, Inc.*, 1998 WL 1048497, Civ. No. EP-97-CA-502-H (W.D. Tex. Aug. 21, 1998), App. 73a-74a. The DOJ announced to the Access Board that viewing angles for wheelchair seating must be "equivalent or better than the viewing angles . . . provided by 50 percent of the seats in the auditorium, counting all seats of any type sold." *See* ADAAG Proposed Rules, 64 Fed. Reg. 62,248, 62,278, App. 47a-48a. The DOJ argued to the Central District of California that wheelchair seating locations must provide "a line of sight that approaches an optimal viewing zone." *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1106 (C.D. Cal. 2002). The DOJ made what the District of Massachusetts described as a "confusing, overlong, and . . . 'absurdly demanding'" interpretation of Section 4.33.3 based on a report by a purported expert. *See United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 87 and n.2 (D. Mass. 2003). Finally, in *Stewmon*, the DOJ proffered yet another interpretation, which the court described as requiring movie exhibitors to "provide wheelchair users with lines of sight within the range of viewing angles offered to most patrons." *Stewmon*, 339 F.3d at 1133, App. 17a.

United States District Court for the District of Oregon. Stewmon complained that the wheelchair seating locations in Regal's Portland-area stadium-style movie theaters failed to provide comfortable "viewing angles" allegedly required under Section 4.33.3 and violated the ADA as a matter of law. Regal denied that Section 4.33.3 imposed a subjective "viewing angle" requirement and asserted that wheelchair seating providing unobstructed views to the screen and located amidst or adjacent to seating for the general public complies with Section 4.33.3 and the ADA as a matter of law. Both Stewmon and Regal filed motions for summary judgment.

Shortly before the present lawsuit was filed, the Fifth Circuit issued its decision in *Lara v. Cinemark*, holding that wheelchair seating locations in stadium-style movie theaters that provide unobstructed views of the movie screen comply with the "lines of sight comparable" language of Section 4.33.3. *Lara*, 207 F.3d at 783.[8] The Fifth Circuit reasoned that the text of Section 4.33.3 does not clearly contain a "viewing angle" requirement, that concerns regarding "viewing angle" did not even arise until well after Section 4.33.3 was promulgated, that the common meaning of "lines of sight comparable" refers to unobstructed views and not "viewing angles," and that the Access Board had expressly recognized that additional language was necessary to codify any alleged "viewing angle" requirement. *Id.* at 788-89. In reaching this conclusion and rendering judgment for Cinemark as a matter of law, the Fifth Circuit considered

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8. The Fifth Circuit found it significant that all wheelchair seating at Cinemark's stadium-style movie theaters was located "amidst general public seating." *See Lara*, 207 F.3d at 789; *accord United States v. Cinemark USA, Inc.*, Mem Op. & Order at 18, App. p. 70a-71a (granting summary judgment as to all stadium-style movie theaters where the wheelchair seating provides an unobstructed view of the movie screen and is located amidst or adjacent to seating for the general public). This is logical, since wheelchair seating located "amidst or adjacent to general public seating" is at least presumptively (if not necessarily) "comparable" to general public seating, especially in the context of a small movie theater where all seats are of relatively equal desirability.

and expressly rejected the DOJ's "litigating position" concerning Section 4.33.3. *Id.*

On April 30, 2001, the district court in this action (Hon. Garr M. King) issued a published opinion granting Regal's motion for summary judgment and denying Stewmon's motion for summary judgment. *OPVA*, 142 F. Supp. 2d at 1294, App. 27a. In so holding, the court characterized the reasoning of the Fifth Circuit in *Lara* as "persuasive, given its reliance on the history of [Section] 4.33.3 and the context in which it was promulgated." *Id.* at 1297, App. 35a. As the Fifth Circuit did in *Lara*, the district court concluded that when wheelchair seating provides unobstructed views of the movie screen from locations amidst seating for the general public, it complies with Section 4.33.3. *Id.*, App. 36a. The court also rejected arguments that a "viewing angle" requirement could be interpreted from Section 4.33.3. *Id.* at 1297-98, App. 36a ("it would be unreasonable and inconsistent with the history of Section 4.33.3 . . . to interpret it to require stadium-style theaters to provide wheelchair-bound moviegoers with comparable viewing angles"). Stewmon appealed the final judgment to the Ninth Circuit.

On August 13, 2003, a divided panel of the Ninth Circuit, in an opinion authored by the Honorable Betty B. Fletcher, reversed the district court's judgment. Describing Section 4.33.3 as "a broadly-drafted regulation" not limited to what was anticipated at the time the regulation was promulgated, the majority held that the DOJ's "interpretation" that Section 4.33.3 contained a "viewing angle" requirement was valid and deserved deference. *Stewmon*, 339 F.3d at 1133, App. 16a-17a. The court dismissed the Fifth Circuit's contrary conclusion as "particularly specious." *Id.* at 1133 n.9, App. 15a. Ignoring that Regal's theaters were built prior to the publication of the DOJ's "interpretation," the majority did not address the issue of preconstruction notice, but concluded that Regal should have constructed its stadium-style movie theaters to provide wheelchair seating locations "within the range of angles offered to the general public." *Id.* at 1133, App. 17a. Apparently convinced that wheelchair seating located amidst or adjoining

general public seating did not comply with this "viewing angle" requirement, the majority reversed the district court's summary judgment in favor of Regal and remanded the case with instructions to enter summary judgment in favor of Stewmon.[9]

The Honorable Andrew Kleinfeld dissented. He criticized the majority for "set[ting] up a conflict with the Fifth Circuit," adopting an "unjust" interpretation of Section 4.33.3, and "irresponsibl[y] impos[ing] on the country a decision that will require of an industry so much reconstruction" without notice. *Stewmon*, 339 F.3d at 1134, App. 18a-20a (Kleinfeld, J., dissenting). Judge Kleinfeld also disapproved of the DOJ's attempt to "interpret" into existence new substantive requirements, stating "the regulation plainly does not mean what the Justice Department says it means," and pointing out that the Access Board's 1999 Notice of Proposed Rulemaking "implicitly acknowledges" that the DOJ is "arguing for creation of new law rather than a permissible construction of existing regulations." *Id.* at 1134-36, App. 20a, 24a (Kleinfeld, J., dissenting). According to Judge Kleinfeld, by unjustly "[r]egulating movie theater architecture retroactively by vague judicial fiat," the majority decision "puts theater owners in a position of impossible uncertainty as to what they must do to comply with the law." *Id.*, App. 18a, 20a (Kleinfeld, J., dissenting).

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9. In reversing the district court's decision to grant Regal's motion for summary judgment against Stewmon, the Ninth Circuit majority assumed contested facts in the light most favorable to Stewmon. *See Stewmon*, 339 F.3d at 1129-1130. The court not only drew permissible inferences in favor of Stewmon, however, but it also relied on documents, including purported industry studies, for which there was no proper foundation in the record. Even more troubling, the court relied on the same faulty "evidence" and applied the same "in the light most favorable to Stewmon" presumptions to support its decision to direct the district court to *grant* Stewmon's motion for summary judgment. In considering *Stewmon's* motion for summary judgment, the Ninth Circuit was obligated to consider record facts in the light most favorable to *Regal* (the non-moving party in that motion). *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's *Stewmon* decision condemns builders, owners, and operators of public accommodations to "impossible uncertainty" as to what is legally required when designing and constructing places of public accommodation. The same stadium-style movie theater design that was approved as compliant with federal accessibility regulations by the Fifth Circuit (and federal courts in Texas, Ohio, and Oregon) has been declared noncompliant in the Ninth Circuit. The decision below effectively creates new "viewing angle" standards for wheelchair seating in assembly areas, puts "thousands of movie theaters . . . out of compliance with the law," and subjects "facilities built in compliance with the law according to the best knowledge of design professionals at the time" to devastating retrofitting liabilities. *Stewmon*, 339 F.3d at 1134, App. 19a (Kleinfeld, J., dissenting). At the same time, architects and builders have no clear explanation of how they allegedly failed to build lawfully in the first place, and still lack notice of a clear and precise requirement to comply with for future construction purposes. *See id.* at 1134, App. 24a (Kleinfeld, J., dissenting) ("the majority's gloss on the regulation, besides being something different from what the regulation says, is no help at all to theater owners trying to comply with the law").

The dispute over whether Section 4.33.3 may be interpreted to impose a new "viewing angle" requirement is recurring, as illustrated by the Fifth Circuit's *Lara* decision, the Ninth Circuit's *Stewmon* decision, and the fact that cases presenting this same issue are now pending in the Sixth Circuit (*United States v. Cinemark*), the First Circuit (*United States v. Hoyts*), and several other district courts.[10] Resolution of this issue is

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10. Eight other federal district courts have issued rulings in similar stadium-style movie theater cases. Federal district courts in the Southern, Eastern, and Western Districts of Texas followed *Lara* and dismissed with prejudice lawsuits presenting facts, claims, and legal issues virtually identical to those in the present case. *See Wittie v. Cinemark USA, Inc.*, No. A-98-CA-40JN (W.D. Tex. 1998) (dismissing Section 4.33.3 (Cont'd)

urgently needed so that builders of movie theaters and other places of public accommodation will know what is expected of them. Not only does the current conflict inhibit public accommodation construction, the ambiguity of the Ninth

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(Cont'd)
challenges to stadium-style movie theater wheelchair seating locations in Austin, Texas and Pflugerville, Texas); *Vander Hee v. Cinemark USA, Inc.*, Civ. Action No. M-98-230 (S.D. Tex. 1998) (same in Mission, Texas); *Drey v. Cinemark USA, Inc.*, Civ. Action No. H-98-2021 (S.D. Tex. 1998) (same in Houston, Texas); *Freeland v. Cinemark USA, Inc.*, Civ. Action No. 1:98CV1976 (E.D. Tex. 1998) (same in Beaumont, Texas). In *United States v. Cinemark*, which is now pending before the Sixth Circuit, the Northern District of Ohio held that Section 4.33.3 imposed no "viewing angle" requirement and that wheelchair seating providing unobstructed views of the movie screen from locations amidst or adjoining general public seating was lawful. *See United States v. Cinemark USA, Inc.*, Mem. Op. & Order at 11-12, App. 62a-65a. In *Meineker v. Hoyts Cinemas Corp.*, 216 F. Supp. 2d 14, 18 (N.D.N.Y. 2002), the Northern District of New York found that Section 4.33.3 imposes a "viewing angle" requirement but adopted a modified version of the *Lara* court's holding that wheelchair seating areas providing unobstructed views to the screen and located-amidst seating for the general public comply with Section 4.33.3. That decision was subsequently vacated by the Second Circuit and remanded with directions that the lower court consider whether the court should give deference to the DOJ's "interpretation" and whether Hoyts was given preconstruction notice of that "interpretation." *Meineker v. Hoyts Cinemas Corp.*, No. 02-9034, 2003 WL 21510423 (2d Cir. July 1, 2003). In *United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092, 1111, 1113 (C.D. Cal. 2002), the Central District of California concluded that "flexible" language in Section 4.33.3 imposes a "comparable viewing angle" requirement and ruled that wheelchair seating locations in AMC's stadium-style movie theaters were unlawful. Finally, in *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 89 (D. Mass. 2003), which is now pending before the First Circuit, the District of Massachusetts concluded that Section 4.33.3 could be interpreted to impose a "viewing angle" requirement, but because the DOJ failed to give Hoyts preconstruction notice of any "viewing angle" interpretation, any "viewing angle" requirement would be limited to prospective application only.

Circuit's decision further exacerbates the confusion for those who build and invest in places of public accommodation. As stated by Judge Kleinfeld, "[i]f a judge on the panel cannot say just what is required [by this decision], how can a movie theatre owner? It is irresponsible to impose on the country a decision that will require of an industry so much reconstruction, without clear guidance on what must be done." *Stewmon*, 339 F.3d at 1134, App. 20a (Kleinfeld, J., dissenting).

The Ninth Circuit's *Stewmon* decision invites agencies to misuse the judiciary as a proxy for conducting substantive rulemaking while circumventing the notice and comment procedures required by the Administrative Procedure Act, 5 U.S.C. §§ 551-912. Courts following the Ninth Circuit's reasoning feel constrained by this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), to grant "controlling" outcome-determinative deference to an agency's purported interpretation of an ambiguous regulation. However, when the agency's "interpretation" includes substantive obligations not clear from the face of the regulation, the application of "controlling deference" implicates critical administrative law principles. When the courts give binding effect to the substantive requirements of an agency's interpretation of an ambiguous regulation, an interpretative policy statement becomes a *de facto* legislative rule for all practical purposes. Even worse, while effectively binding the public to its new interpretation, the DOJ retains the flexibility to "reinterpret" the law another day. Unless this deference standard conflict is resolved, the reliability and finality of all accessibility construction regulations will remain in question. Moreover, nothing limits the Ninth Circuit's holding to the movie theater industry or the ADA specifically; other regulated industries face comparable uncertainty. Allowing the agencies to offensively use the deference doctrines, as shown by the DOJ's opportunistic litigation practices here, increases an agency's power well beyond that contemplated by Congress in the APA.

A. The Ninth Circuit's Interpretation Of Section 4.33.3 Creates A Conflict With The Fifth Circuit That Must Be Resolved By This Court.

By holding that Section 4.33.3 may be interpreted to impose a previously unarticulated "viewing angle" requirement for wheelchair seating locations in places of public assembly, the Ninth Circuit created a direct conflict with the Fifth Circuit and with lower courts on several issues. In *Lara*, the Fifth Circuit found that wheelchair seating locations similar to those at issue here, located near the front of the movie theater amidst seating for the general public, complied with Section 4.33.3 as a matter of law. *Lara*, 207 F.3d at 788-89. The Northern District of Ohio and the district court below each reached the same conclusion with respect to substantially similar stadium-style movie theater configurations. *See United States v. Cinemark USA, Inc.*, Mem. Op. & Order at 11-12, App. 62a-65a; *OPVA*, 142 F. Supp. 2d at 1297, App. 35a.; *accord Stewmon*, 339 F.3d at 1136, App. 25a-26a (Kleinfeld, J., dissenting).

The Fifth Circuit, the Northern District of Ohio, and the District of Oregon each determined that the common and historical meaning of "lines of sight comparable" refers to unobstructed views, not "viewing angles." *See Lara*, 207 F.3d at 788 (DOJ and Access Board explicitly considered questions of obstruction before issuing Section 4.33.3, but not questions of viewing angles); *United States v. Cinemark*, Mem. Op. & Order at 11, App. 62a-63a ("The government has not persuaded the [c]ourt that either the DOJ or the Access Board intended Section 4.33.3 to encompass viewing angle."); *OPVA*, 142 F. Supp. 2d at 1297, App. 35a (finding the Fifth Circuit's reasoning on the history of Section 4.33.3 to be "persuasive"); *see generally Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 583 (D.C. Cir. 1997) ("We think the language 'lines of sight comparable' quite naturally is interpreted to refer to the ability of a wheelchair user to see a performance without

any obstruction."). The Ninth Circuit majority disagreed. *See Stewmon*, 339 F.3d at 1133, App. 16a-17a.[11]

The Fifth Circuit, the Northern District of Ohio, and the District of Oregon each found that the DOJ's "interpretation" was not supported by indications of agency intent at the time the regulation was promulgated. *See Lara*, 207 F.3d at 788 ("questions regarding 'viewing angle' did not arise until well after the DOJ promulgated section 4.33.3"); *OPVA*, 142 F. Supp. 2d at 1297-98, App. 36a ("it would be unreasonable and inconsistent with the history of Section 4.33.3 . . . to interpret it to require stadium-style theaters to provide wheelchair-bound moviegoers with comparable viewing angles"); *United States v. Cinemark*, Mem. Op. & Order at 11-13, App. 61a, 65a ("[t]he government has not persuaded the Court that either the DOJ or the Access Board intended Section 4.33.3 to encompass viewing angle" and "the DOJ's position with respect to Cinemark's stadium-style theaters is not embodied in the current [regulation]"). The Ninth Circuit discounted agency intent at time of promulgation, finding instead that applying Section 4.33.3 to situations not contemplated by the DOJ when it enacted the regulation demonstrates (admirable) "breadth," not "ambiguity." *Stewmon*, 339 F.3d at 1133, App. 16a.

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11. The Fifth Circuit, the Northern District of Ohio, and the District of Oregon also found it significant that wheelchair seating locations amidst or adjacent to seating for ambulatory patrons inherently were "comparable" to seating for the general public. This analysis is particularly compelling with respect to the smaller venues at issue in this case, since Section 4.33.3 permits wheelchair seating to be clustered in a single location where, as here, there are fewer than 300 seats, and also where, as here the tiered seating rises at slopes of greater than five percent. *See* ADAAG § 4.33.3, App. 45a. The District Court for the Northern District of New York also discussed the comparability of wheelchair seating locations amidst general public seating in *Meineker v. Hoyts Cinemas Corp.* While the court believed that Section 4.33.3 imposed a "viewing angle" requirement, it ultimately concluded that wheelchair seating areas providing unobstructed views to the screen and located amidst seating for the general public complied with Section 4.33.3 as a matter of law. *Meineker*, 216 F. Supp. 2d at 18.

Finally, the Fifth Circuit, the Northern District of Ohio, and the District of Oregon independently determined that the Access Board's November 1999 comments, delivered as part of that agency's on-going ADAAG rulemaking, evidenced that no "viewing angle" requirement existed. *See Lara*, 207 F.3d at 788-89 (rejecting DOJ's "viewing angles" interpretation in light of Access Board's consideration of proposal to modify Section 4.33.3); *OPVA*, 142 F. Supp. 2d at 1297, App. 36a (finding it would be unreasonable and inconsistent with . . . the statements of the Access Board to defer to the DOJ's "viewing angles" interpretation); *United States v. Cinemark USA, Inc.*, Mem. Op. & Order at 13, App. 64a (reasoning that the Access Board's comments "evidence that the DOJ's position [on viewing angles] with respect to Cinemark's stadium-style theaters is not embodied in current Section 4.33.3"); *see also Stewmon*, 339 F.3d at 1134, App. 20a (Kleinfeld, J., dissenting) (concluding that the Access Board's 1999 Notice of Proposed Rulemaking "implicitly acknowledges" that the DOJ is "arguing for creation of new law rather than a permissible construction of existing regulations").[12] The Ninth Circuit ignored the Access Board's 1999 acknowledgements altogether.

By expansively interpreting Section 4.33.3 to mandate compliance with previously unarticulated "viewing angle" construction requirements, summarily rejecting the Fifth

12. These courts also rejected any argument that Section 4.33.3 should be applied flexibly based on the subjective "preference" of movie patrons. *See Lara*, 207 F.3d at 789 ("To impose a viewing angle requirement at this juncture would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers."); *accord Stewmon* 339 F.3d at 1136, App. 23a (Kleinfeld, J., dissenting) (discussing differing preferences for seating in the front (for maximum picture size and stereo effect and to avoid distractions), the back (for greater height and sense of separation from the picture), the aisles for easy access to bathrooms and concession stands), and the center (to avoid aisle distractions), and concluding that "lines of sight for the wheelchair seats cannot be comparable to all of these, without requiring the scattering of wheelchair seating that the 300-seat provision expressly avoids requiring in small theaters").

Circuit's contrary reasoning as "specious," and ignoring the meaning and effect of the Access Board's rulemaking efforts, the Ninth Circuit has injected unnecessary confusion, error, and uncertainty into public accommodation accessibility law. Architects, builders, and owners of public accommodations who must rely on clear, precise, and prospective regulations to build public facilities now have a circuit split and federal district court conflicts, resulting in varying interpretations of a supposedly uniform regulation and "impossible uncertainty." Legality under a federal regulation should not vary from circuit to circuit, and certainly should not present conflicts for Regal and other national movie theater companies who own and operate stadium-style movie theaters in both the Fifth and Ninth Circuits. A definitive ruling by this Court is necessary to resolve these issues and ensure a uniform interpretation of Section 4.33.3 for architects and builders across the nation.

B. The Court Should Determine Whether The Judiciary Should Accord "Controlling Deference," Or Any Deference, To An Agency's After-The-Fact Interpretation Of A Regulation That Imposes Substantive Obligations Not Clear From The Face Of The Regulation And Is Adopted Without APA Notice And Comment.

1. Administrative agencies should be prevented from invoking judicial deference to impose new substantive regulatory requirements on the public.

The Ninth Circuit's enforcement of the DOJ's "interpretation" of Section 4.33.3 ratifies an affirmative and offensive use of this Court's pronouncements regarding the appropriate circumstances for granting deference to agency interpretations espoused in litigation and dishonors Congress's limits on agency rulemaking. Through concerted litigation efforts, the DOJ has effectively created new substantive obligations under Section 4.33.3 that were not contemplated when the rule was promulgated. In giving a "controlling" level of deference to such agency action, the Ninth Circuit's opinion raises a profound and broadly significant issue of administrative

law. Specifically, the Ninth Circuit's decision opens the door to widespread circumvention of APA rulemaking requirements by allowing agencies to use a judiciary constrained by deference doctrines as a proxy to conduct substantive rulemaking without engaging in notice and comment. As discussed below, the Ninth Circuit's approach stems in part from a significant tension in this Court's judicial deference doctrine on the one hand, and the APA on the other. Under these deference doctrines, the courts effectively imbue mere interpretations of rules with the force of law, which results in *de facto* agency rulemaking.

In *Auer*, this Court deferred to an agency's interpretation of an ambiguous regulation.[13] The Court stated that the agency's interpretation was "controlling" unless it was plainly erroneous or inconsistent with the regulation. *Auer*, 519 U.S. at 461. Although the interpretation was challenged because it was articulated in a legal brief, the Court found that the Secretary's position "was in no sense a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack" and that there was "no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)) (quotations omitted). By contrast, in *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court refused to defer to an agency's interpretation of a regulation, as set forth in an opinion letter and later buttressed by an *amicus curiae* brief. *Id.* at 587, 591. The Court held that "[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id.* at 587. The Court recognized that according controlling deference

13. While Regal believes that Section 4.33.3 is not ambiguous, the Ninth Circuit apparently disagreed, as it invoked *Auer* to defer to the DOJ's interpretation, and such deference "is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

creates a risk of "permit[ting] the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* at 588.[14]

2. The Court should resolve the recurring confusion in the lower courts concerning where to draw the line between administrative flexibility for non-binding policy statements and procedural safeguards for substantive rulemaking under the APA.

Under the APA, federal agencies must follow specific rulemaking procedures before formulating substantive rules. 5 U.S.C. §§ 553(b), (c).[15] Those procedures ordinarily require published notice and an opportunity for public comment, followed by agency deliberation, explanation, and publication of the final rule in the Federal Register. The APA distinguishes "legislative" rules from "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" that do not bind the public. 5 U.S.C. § 553(b)(3); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) ("Interpretive rules . . . do not have the force and effect of law and are not accorded that weight in the adjudicatory process. . . ."). A rule is substantive if it "grants rights, imposes obligations, or produces significant effects on private interests" or "creates new law, rights, or duties." *Ohio Dep't of Human Servs. v. United States Dep't of Health & Human Servs.*, 862 F.2d 1228, 1232

14. Similarly, in *Bowen*, the Court held "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice" are unworthy of deference. *Bowen*, 488 U.S. at 212. In addition, the Court noted that "*post hoc* rationalizations for agency orders" were not entitled to deference, and further observed that the agency's interpretation conflicted with positions taken in other cases. *Id.* at 212-13.

15. The APA defines rules as statements "designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of . . . facilities." 5 U.S.C. § 551(4)

(6th Cir. 1988); *accord Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979). The courts determine whether a rule must be promulgated after notice and comment by examining its substance rather than relying upon the label given by the agency. *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 619 (5th Cir. 1994) ("the label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact").[16] The characterizations of agency statements as "interpretive rules, general statements of policy, or rules of agency procedure" under 5 U.S.C. § 553(b) are "narrowly construed" and "only reluctantly countenanced." *San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966, 969 (9th Cir. 1989); *accord*, *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989). If a rule is determined to be substantive in character but was not subjected to notice and comment, the Court "shall hold unlawful and set aside" the rule as statutorily unauthorized agency action. 5 U.S.C. § 706(2)(C), (D).[17]

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16. Courts have held that legislative rules were manifest in a procedure paper (*Phillips*, 22 F.3d at 621); a purported guidance document (*Gen. Elec. Co. v. EPA*, 290 F.3d 377, 384 (D.C. Cir. 2002)), an agency notice to the affected industry (*Brown Express*, 607 F.2d at 703), and an agency directive (*Lewis-Mota v. Sec'y of Labor*, 469 F.2d 478, 482 (2d Cir. 1972)).

17. The rulemaking procedures set forth in the APA not only operate as a check on administrative abuse, but also are essential to uphold the principles of democratic governance in a regulatory age. "[H]igh-handed agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action." *Chamber of Commerce v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980). "[A]dvance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era." *Id.* at 472 (Bazelon, J., concurring). An agency's attempt to make an interpretative rule do the work of a legislative rule offends the APA and principles of sound government. *See generally* Robert A. Anthony, (Cont'd)

When applying *Auer* to defer to agency interpretations articulated in litigation, the courts have struggled to effectuate the requirements of the APA. In *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999), for example, the Seventh Circuit considered the DOJ's interpretation of the ADA as set forth in an *amicus* brief, and commented that the proper degree of deference to give an agency's informal policy announcements under current law is "unsettled." *Id.* at 563. The court further observed,

> though we know from *Auer* . . . that in some circumstances at least, an agency's *amicus* brief is entitled to some deference, it cannot be very great when it is the brief of an agency that has, and has exercised, rulemaking powers yet has unaccountably failed to address a fundamental issue on which the brief takes a radical stance.

Id. (citing *D.C. Arena*, 117 F.3d at 588-89). Other courts have recognized that litigating positions may not truly reflect the "fair and considered judgment" required by *Auer* to merit deference. *See, e.g., Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000); *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997).[18]

(Cont'd)

Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public, 41 Duke L.J. 1311, 1372-73 (1992).

18. Moreover, the absence of a longstanding agency practice prior to litigation weighs against granting deference. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962) ("We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. . . . [U]nless we make the requirements of administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion."); *Appalachian States Low-Level Radioactive Waste Comm'n v. Pena*, 126 F.3d 193, 198-99 (3d Cir. 1997) (consistency between agency's prior policy statement and litigating position supports deference); *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999) (legal brief not entitled to deference).

When a new substantive requirement masquerades as an agency interpretation, some courts have looked beyond form and declined to defer. In *Hoctor v. United States Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996), the Seventh Circuit refused to allow the agency, through internal memorandum and interpretation, to quantify a specific height requirement for fences used to contain the animals. *Id.* at 170-71. The court recognized that the specific height requirement would put some unknown portion of the industry out of compliance and put their fences in jeopardy. If the agency intended to bind the industry, the court reasoned, the APA's requirements for legislative rules would apply. *Id.* at 169-170.[19]

3. This case presents an ideal opportunity for the Court to resolve recurring issues concerning judicial deference to agency interpretations.

The conflict between the Ninth and Fifth Circuits over the interpretation of Section 4.33.3 presents a paradigmatic example of conflicts concerning whether deference is owed to an agency's "interpretation" setting forth specific substantive obligations in the context of litigation. On the one hand, the Fifth Circuit rejected the DOJ's interpretation, treating it as a "litigating position." On the other hand, the Ninth Circuit concluded that the DOJ's interpretation commanded "controlling deference" under virtually identical circumstances. *Compare Lara*, 207 F.3d

19. Similarly, in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), the court recognized that if an agency treats a document as it would a legislative rule, the document may be considered "binding" and subject to the strictures of the APA. *Id.* at 1020-22, 1028 (holding that settled position set forth in "guidance" document was effectively binding, and accordingly setting aside guidance document for failure to comply with rulemaking procedures); *see also Gen. Elec.*, 290 F.3d at 383-84 (vacating "guidance" document establishing specific risk assessment techniques and guidance for review as improper legislative rule); *Am. Frozen Food Inst., Inc. v. United States*, 855 F. Supp. 388, 390-91, 396 (CIT 1994) (agency definition quantifying type face and font size for label was not a valid interpretation but rather improperly imposed additional requirements).

at 788-89, *with Stewmon*, 339 F.3d at 1132, App. 15a-16a.[20] The DOJ interpretations offered in these cases went beyond merely clarifying purportedly ambiguous terms and actually imposed specific substantive requirements that were not clear from the plain language of the rule. By enforcing these substantive requirements, which were found only in agency documents that post-date the regulation, the Ninth Circuit has effectively imparted the force of law upon an "interpretive" rule, in conflict with the APA and sound administrative law jurisprudence.[21]

4. This Court should hold that the DOJ's interpretation of Section 4.33.3 is not entitled to deference.

The Ninth Circuit *Stewman* majority has given agencies great incentives to forgo the legislative rulemaking process in favor of simply "interpreting" new obligations into purportedly ambiguous rules. Rulemaking by *amicus* is bad public policy.

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20. Still other courts have addressed the appropriate level of deference to give the DOJ's interpretation of Section 4.33.3 with disturbingly varied results. For example, the district court in *Meineker* implicitly rejected the DOJ's interpretation of Section 4.33.3. *Meineker*, 216 F. Supp. 2d at 18. On appeal, the Second Circuit, in an unpublished decision, vacated the district court's judgment and remanded the case for consideration of two issues, (1) whether the DOJ's interpretation of Section 4.33.3 was entitled to deference as a "fair and considered judgment" under *Auer* or whether it was merely a *post hoc* rationalization or convenient litigation position entitled to little deference under *Christensen* and *Bowen*, and (2) whether the theater owner had reasonable notice of the DOJ's interpretation when the theaters were constructed or renovated. *Meineker*, 2003 WL 21510423, at *3-4.

21. Other efforts by the DOJ to expand the substantive requirements of Section 4.33.3 through litigation in the context of viewer obstructions in sports stadiums have also resulted in conflicting circuit opinions. *Compare Caruso*, 193 F.3d at 737 (rejecting interpretation of Section 4.33.3 that would require sight lines over standing spectators), *with D.C. Arena*, 117 F.3d at 584-85 (deferring to DOJ's interpretation in sports stadium context); *see also Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 743 (D. Or. 1997) (rejecting DOJ's interpretation).

See D.C. Arena, 117 F.3d at 584 ("It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.' That technique would circumvent § 553, the notice and comment procedures of the APA."). If left unchecked, the Ninth Circuit's holding allows courts to misapply *Auer* and agencies to eviscerate the APA's notice and comment process, effectively erasing the distinctions between interpretive and legislative rules.

The DOJ's tactics here stand in stark contrast to the agency conduct meriting deference in *Auer*. In *Auer*, the Court asked for an agency's interpretation of a regulation and the agency (there, the Department of Labor) provided it. *See Auer*, 519 U.S. at 461. Here, no court asked for the DOJ's opinion. Rather, the DOJ deliberately set out to construct and impose a new "viewing angle requirement" by litigation. The DOJ has not only filed strategic lawsuits, it has injected itself into private cases on an opportunistic basis in order to submit *amicus curiae* briefs and demand "controlling" deference for its interpretation. More often than not, the DOJ appears in these private-party cases in an effort to tip the scales against the theater owners at some critical juncture (such as after the close of discovery and sometimes even after the private plaintiff loses).[22]

The Court should grant certiorari to explain the limits of *Auer* deference to administrative agencies and the courts. It does

22. This attempt to regulate by litigation has drawn criticism from several federal courts. *See Lara*, 207 F.3d at 788-89 (court refused to defer to DOJ's "litigating position" where DOJ failed to provide clear guidance despite Congressional mandate to do so); *Hoyts*, 256 F. Supp. 2d at 92 n.16 ("But for the Government's obduracy, it appears possible to have resolved this dispute via rulemaking settlement."); *OPVA*, 142 F. Supp. 2d at 1297 n.2, App. 35a ("vague viewing angle standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking rather than through an interpretative rule"); *accord Indep. Living Res*, 982 F. Supp. at 743 ("[the DOJ's] interpretation of Standard 4.33.3 expressed in the 1994 TAM supplement is an attempt to impose a new substantive obligation, which may not be accomplished under the rubric of an 'interpretive regulation'").

not appear that this Court intended for *Auer* to support the offensive use of interpretative statements and deference by agencies through industry-wide litigation, as the DOJ did here. *Amicus curiae* briefs and federal complaints are poor substitutes for the notice and comment process mandated by the APA. Such litigation documents do not provide a clear or reliable means for notifying the public of an agency's intent or policy. Moreover, the public is deprived of input on the potential regulations.

As various courts may evaluate the factors considered in the deference doctrines differently, there is a substantial likelihood of inconsistent results and continued "impossible uncertainty." Two primary purposes of federal regulation – uniformity and predictability – have been undermined by an agency's rulemaking-by-litigation strategy, and, knowingly or not, the Ninth Circuit has become the agency's accomplice.

C. Permitting Agencies To Add Substance To Regulations Retroactively Through Litigation Violates The Fair Notice Doctrine And The Due Process Clause.

The Court should not endorse or encourage agencies to interpret regulations through litigating positions in a manner that violates the fair notice doctrine and constitutional due process. When an agency seeks to impose punitive sanctions for violations of its interpretations of regulations, such interpretations must be "ascertainably certain" from the regulation's plain language to be enforceable under the fair notice doctrine. *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995). In this case, the express language of Section 4.33.3 failed to give Regal, along with the entire industry, reasonable notice of any specific viewing angle requirement for wheelchair accessible seating. When the terms of a regulation are so opaque as to be susceptible to substantive development through extrinsic "interpretive" documents provided by an agency, applying those standards to conduct that predates the "interpretive" documents violates the fair notice doctrine.

The federal courts, experts in construing regulations, cannot agree on whether the terms of Section 4.33.3 include the viewing angle requirements announced by the DOJ in its *amicus* briefs,

as discussed above. Section 4.33.3 – read without the benefit of the DOJ's *amicus curiae* briefs – is not "reasonably comprehensible to people of good faith" as including any specific "viewing angle" requirement, and accordingly it does not fairly inform theater owners of the DOJ's perspective.[23] Indeed, courts finding to the contrary rely on the DOJ's interpretation found in extrinsic documents (namely, the *Lara amicus* brief and other litigation documents). *See Stewmon*, 339 F.3d at 1130 & n.5, App. 10a-11a; *Hoyts*, 256 F. Supp. 2d at 87, 89; *AMC*, 232 F. Supp. 2d at 1113.

If the federal courts cannot agree on whether a specific viewing angle is required by a reading of Section 4.33.3 in isolation, the movie theater industry cannot be charged with knowledge of the DOJ's current position back when the theaters were constructed. Thus, regardless of any deference that might be given to the DOJ's interpretation, "the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co., Inc. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.) (citations omitted); *see also United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) (finding that manufacturer was not "out of compliance with a standard" when agency failed to give fair notice of the standard's requirement); *accord, Alaska Prof'l Hunters Ass'n, Inc. v. FAA*,

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23. At essence, the DOJ employs *Auer* to rubber-stamp the creation of new obligations through an agency's interpretation in an *amicus* brief. Without incurring the inconvenience of notice and comment required by the APA, an agency may bind the courts and the public, while itself retaining flexibility to "reinterpret" the rule another day. This contradicts sound administrative law principles. *See generally* Anthony, *Interpretive Rules*, 41 Duke L. J. at 1372-73. Such a callous application of *Auer* defeats the calibrated mechanism for agency rulemaking provided by Congress in the APA: the regulated party is bound without notice, the public is denied legislative process, yet the agency itself is not restricted by its informed "interpretation" and may freely modify its interpretation in an unpredictable manner in the future.

177 F.3d 1030, 1035 (D.C. Cir. 1999) ("Those regulated by an administrative agency are entitled to know the rules by which the game will be played.").

Enforcing the DOJ's "interpretation" of Section 4.33.3 retroactively violates Congress's clear intent in requiring the ADAAG to be published well before it was enforced. Congress expressly directed the DOJ to provide substantial advance notice of architecture and design requirements of Title III. *See* 42 U.S.C. § 12204, App. 43a (requiring Access Board issue architecture and design guidelines within nine months after passage of the ADA); 42 U.S.C. § 12186(b)-(c), App. 41a (requiring the Attorney General to issue regulations consistent with the Access Board's guidelines not later than one year following passage of the ADA); 42 U.S.C. § 12183(a), App. 41a (Title III's accessible design requirement for new construction applies to buildings first occupied after 30 months following passage of the ADA). As acknowledged by some courts, judges are in no position to revisit and reinterpret technical requirements. *See, e.g., Indep. Living Res.*, 982 F. Supp. at 746 ("courts are ill-equipped to evaluate [post-construction] claims and to make what amount to engineering, architectural, and policy determinations as to whether a particular design feature is feasible and desirable"); *Caruso*, 968 F. Supp. at 216-17 ("considerations of due process and the realities of building large, expensive facilities counsel against the courts making architectural, design or engineering judgments in the guise of statutory interpretation").

Agency *amicus curiae* briefs and complaints are not an effective or just means for providing proper notice of new regulatory requirements. *Stewmon*, 339 F.3d at 1134, App. 20a (Kleinfeld, J., dissenting) (criticizing majority opinion and the DOJ for "irresponsibl[y] impos[ing] on the country a decision that will require of an industry so much reconstruction" without notice); *OPVA*, 142 F. Supp. 2d at 1297 n.2, App. 35a (suggesting that "the vague viewing angle standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking rather

than through an interpretative rule"). The decision below undermines an established and predictable notice and comment procedure in favor of unpredictable and punitive litigation.

CONCLUSION

"The wording of laws should mean the same thing to all men." Charles-Louis de Secondat, Baron de Montesquieu, De l'Espirit des Lois (The Spirit of Laws), 1748. Congress recognized that uniformity, notice, and precision in the "wording of laws" is particularly important in the context of the federal construction regulations applied to buildings of public accommodation. Congress intended that Title III of the ADA be enforced via express enabling regulations, adopted deliberately, and with due consideration of all available expertise. Congress also intended that builders have ample notice of such regulations, including an opportunity to comment, object, and illuminate. The entire statutory and regulatory scheme emphasizes notice, process, and clarity. Indeed, when obligations are measured by inch, percentage, and degree, "flexibility" of interpretation is hardly a virtue. In no way did Congress sanction the creation of new obligations casually and through piecemeal litigation, such that the "wording of law" may mean one thing in the Fifth Circuit, something else within the Ninth Circuit, and perhaps still something else tomorrow.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

RAYMOND L. SMITH, JR.
REGAL CINEMAS, INC
7132 Regal Lane
Knoxville, TN 37918

LAURA M. FRANZE
Counsel of Record
AKIN GUMP STRAUSS
HAUER & FELD LLP
1700 Pacific Avenue
Suite 4100
Dallas, TX 75201
(214) 969-2800

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED AUGUST 13, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-35554

D.C. No. CV-00-00485-KI

OREGON PARALYZED VETERANS OF AMERICA, an Oregon non-profit Corporation,

Plaintiff,

and

KATHY STEWMON; TINA SMITH; KATHY BRADDY,

Plaintiffs-Appellants,

v.

REGAL CINEMAS, INC., a Tennessee Corporation doing business in Oregon; EASTGATE THEATRE INC., dba Act III Theater, Inc.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Argued and Submitted
December 2, 2002—Seattle, Washington

Appendix A

Filed August 13, 2003

Before: Betty B. Fletcher, Andrew J. Kleinfeld and M. Margaret McKeown, Circuit Judges.

Opinion by Judge B. Fletcher;
Dissent by Judge Kleinfeld

OPINION

B. FLETCHER, Circuit Judge:

This appeal concerns the validity of the Department of Justice's ("DOJ") interpretation of its own regulation requiring that movie theaters, pursuant to Title III of the ADA, provide comparable lines of sight for wheelchair-bound and non-wheelchair-bound moviegoers. Three individual, disabled plaintiffs and the Oregon Paralyzed Veterans of America ("OPVA") sued two companies that own and operate movie theaters in Oregon. The theaters at issue located all wheelchair-accessible seats in the front rows, where the vertical viewing angle was significantly sharper than in the rest of the theater.

The plaintiffs raised three claims. First, they alleged that the "stadium seating" plans in six of the defendants' movie theaters violate Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12182, and DOJ's regulations promulgated thereunder. The plaintiffs also claimed that the seating plans violate Oregon's public accommodations statute, Or. Rev. Stat. § 659.425(3), and claimed negligence in the design, construction, and operation of the stadium-riser

theaters. They sought declaratory and injunctive relief, compensatory and punitive damages under the Oregon statute, and damages for negligence (in an amount to be proved at trial), in addition to attorneys' fees and costs.

The district court granted summary judgment to the defendants on all three claims. The three individual plaintiffs[1] now appeal the district court's decision as to the ADA claim only. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

I. FACTS

Viewed in the light most favorable to the appellants, the non-moving parties, *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002), the record reveals the following facts. The plaintiffs-appellants in this case are three disabled, wheelchair-bound individuals living in Oregon. The defendants are Regal Cinemas, Inc. and Eastgate Theatre, Inc., two companies that own and/or operate six movie theaters in Oregon.[2] All six theaters utilize a design incorporating "stadium-riser seating," which places most of

1. OPVA, the fourth plaintiff in the original lawsuit, has not joined in this appeal.

2. The six theaters are the Movies on TV theater complex in Washington County, the Division Street Theaters in Multnomah County, the Stark Street theater complex in Portland, the Wilsonville 9 complex in Clackamas County, the Santiam 11 complex in Marion County, and the Sherwood 10 theater in Yamhill County. All six were designed and constructed for first occupancy after January 26, 1993, and are thus subject to the requirements of Title III of the A.D.A. for "new construction." 42 U.S.C. § 12183(a)(1).

the theater seats on stepped risers rather than on a sloped floor. The purpose of the stadium design is to maximize unobstructed views for theater patrons. In most cases, the first few rows at the front of the theater are set on a sloped floor; there is an aisle at the entry level of the theater separating the sloped portion of the seating from the riser section, and the stadium seats (approximately 6-13 rows) then rise behind the aisle, with each row raised 15-18" above the one in front of it.

In order to get to the seats in the stadium riser section, patrons must walk up stairs on either side of the seating section. The riser seats are not wheelchair-accessible. In all six theaters, seating for disabled patrons is located only in the first five rows; in five of the six theaters,[3] wheelchair-accessible seating is located only on the sloped portion of the floor, not in the aisle or in the stadium seating, with over half of the accessible seats in the very front row. The result is that all patrons who require wheelchairs have no choice but to sit in the first few rows of the theater.

As the appellants point out, locating all of the wheelchair-accessible seating in the first few rows of the theaters creates significant disadvantages for wheelchair-bound patrons. Plaintiffs' experts, who visited the theaters and conducted research there, found that the vertical lines of sight for the wheelchair seating locations ranged from 24 to 60 degrees, with an average of approximately 42 degrees, as compared with the average median line of sight of 20 degrees in the

3. The only exception is the Sherwood Theater, in which four of the auditoriums have wheelchair-accessible seating located in the stadium riser areas.

non-wheelchair seating — a difference the experts termed a "tremendous disparity." In reality, however, the disparity is even greater, because wheelchair-bound patrons cannot slump in their seats and recline their bodies in order to adjust for the unfavorable viewing angle, as can able-bodied patrons sitting in the same part of the theater.

In its engineering guideline for movie theaters, the Society of Motion Picture and Television Engineers ("SMPTE") concluded that, for most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35 degrees, and when the horizontal line of sight measured between a perpendicular to the viewer's seat and the centerline of the screen exceeds 15 degrees. Soc'y of Motion Picture & Television Eng'rs, *SMPTE Engineering Guideline: Design of Effective Cine Theaters 5* (1994) (hereinafter *SMPTE Guideline*). Thus, not only do the wheelchair seats themselves have, on average, highly unfavorable viewing angles relative to the rest of the theater, but the patrons sitting in them will be less able than other patrons to adjust for those angles by shifting position in their seats.

The experts' conclusions were also borne out by the individual plaintiffs' own experiences in the theaters, as recounted in their affidavits and deposition testimony. Kathy Stewmon, who has multiple sclerosis and has been wheelchair-bound since 1989, related:

> Sitting in [the front row], so close to the screen, the screen was so huge that I couldn't focus on it; it made me dizzy trying to focus. I had to keep moving my head and neck back and forth to look

> at the whole movie screen. I found myself losing the story because I was working so hard to watch the screen; I couldn't concentrate on the movie.
>
> . . .
>
> I only lasted about 15 minutes in the front row — I couldn't tolerate it. My family members dragged my wheelchair up the stairs, which was [a] very dangerous and precarious thing to do, so I could watch the movie.

Plaintiffs Tina Smith and Kathleen Braddy related similar experiences: sitting in the front row of the theater made Smith nauseous and gave her a headache, and Braddy testified that she was unable to watch a movie with her grandson from the wheelchair-accessible rows of the theater because she would have had to bend her neck back to the point where her vision would have been blurry, and because the sound was "not comfortable that close."

In the district court, both the plaintiffs and the defendants moved for summary judgment. The district court denied the plaintiffs' motion for summary judgment and granted the defendants' motion for summary judgment.[4] *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293 (D. Or. 2001). The district court recognized that the defendants' movie theaters are public

4. The district court granted the defendants' motion for summary judgment on all three grounds. However, because only the ADA claim is presented in this appeal, this section will address only those parts of the district court's opinion that pertain to it.

accommodations subject to Title III of the ADA, which provides generally:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). As the district court went on to note, Congress directed the Department of Justice ("DOJ") to issue regulations that provide substantive standards applicable to facilities covered under Title III. 42 U.S.C. § 12186(b); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 580 (D.C. Cir. 1997), *cert. denied sub nom. Pollin v. Paralyzed Veterans of Am.*, 523 U.S. 1003 (1998). DOJ, in turn, adopted as regulations a set of guidelines promulgated by the Architectural and Transportation Barriers Compliance Board ("Access Board"), a body charged with "establish[ing] and maintain[ing] minimum guidelines and requirements for the standards issued pursuant to" Title III of the A.D.A. 29 U.S.C. § 792(b)(3)(B). These regulations, known as the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"), provide, in relevant part, as follows:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.

Appendix A

28 C.F.R. Pt. 36, App. A, § 4.33.3.

In granting the defendants' motion for summary judgment, the district court held that the language about "lines of sight comparable to those for members of the general public" in § 4.33.3 does not require that wheelchair-accessible seating afford patrons comparable viewing angles to those in non-accessible seating. 142 F. Supp. 2d at 1297-98. The district court followed what was, at the time, the only federal appellate decision in the nation addressing the viewing-angle issue directly: *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000). In *Lara*, the district court had held that, based on the plain language of § 4.33.3, stadium-style seating arrangements like the ones at issue in this case failed to meet the statutory and regulatory requirements:

> "Comparable" simply means capable of being compared; equivalent or similar. . . . [T]he present configuration of the eighteen Tinseltown theaters does not afford wheelchair-bound patrons comparable lines of sight. Either the row designated for wheelchair-bound patrons is too close to the screen, or the screen is too high off the ground, or a combination of both. The average viewing angle from this row is above thirty-five degrees, which the Plaintiffs' expert witness has properly described as "well into the discomfort zone." It should be stressed that this is not some abstract scientific theory which is difficult for the lay person to comprehend. It simply means that a

> person seated in the "wheelchair row" has to lift his or her eyes and/or crane his or her neck at a very uncomfortable angle in order to view the feature on the motion picture screen. . . . The wheelchair-bound patron is denied the full and equal enjoyment of the movie going experience in these eighteen theaters. Therefore, these theaters as presently configured do not conform to the requirements of the Americans with Disabilities Act and Standard 4.33.3.

Lara v. Cinemark USA, Inc., No. EP-97-CA-502-H, 1998 WL 1048497 (W.D. Tex. Aug. 21, 1998), at *2. The Fifth Circuit reversed, noting that "questions regarding 'viewing angle' did not arise until well after the DOJ promulgated section 4.33.3." *Lara*, 207 F.3d at 788. Rather, according to the Fifth Circuit, the primary concern animating section 4.33.3 was that wheelchair users have *unobstructed* views, not that they sit at a certain viewing angle to the screen. *Id.* Thus, the court concluded:

> In light of the lack of any evidence that the Access Board intended section 4.33.3 to impose a viewing angle requirement, the Board's recent statement that it had not yet decided whether to adopt the DOJ's litigating position with respect to stadium-style theaters, and the common meaning of "lines of sight," we cannot conclude that the phrase "lines of sight comparable" requires anything more than that theaters provide wheelchair-bound patrons with unobstructed

> views of the screen. To impose a viewing angle requirement at this juncture would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers.

207 F.3d at 789.

The district court in this case expressly adopted the Fifth Circuit's reasoning in *Lara*, notwithstanding what it termed the "plain meaning" of § 4.33.3. 142 F. Supp. 2d at 1297. The district court found support for the Fifth Circuit's position in "plaintiff's acknowledgment that the stadium riser design was not adopted for movie theaters until 1995 — four years after Section 4.33.3 was adopted by DOJ." *Id.* Moreover, the court apparently adopted as a matter of law *Lara's* holding that locating the wheelchair-accessible seats only in the non-stadium portion of the theater did not violate § 4.33.3's requirement that the accessible seating be an "integral part of any fixed seating plan" — even though it "[did] not read plaintiffs' First Amended Complaint to state such a theory of liability under the ADA." 142 F. Supp. 2d at 1298 n.3.

The district court rejected the plaintiffs' argument that DOJ's interpretation of § 4.33.3, as articulated in the *Lara* litigation, was entitled to deference. *Id.* at 1297. DOJ had filed an amicus brief in the *Lara* case in which it interpreted § 4.33.3 to require that, in stadium-style theaters, "wheelchair locations must be provided lines of sight in the stadium seating seats within the range of viewing angles as those offered to most of the general public in the stadium style

seats, adjusted for seat tilt."[5] The district court found that DOJ's interpretation was not entitled to deference because, for the reasons set forth by the Fifth Circuit in *Lara*, it would be "unreasonable and inconsistent with the history of Section 4.33.3 (including statements by the Access Board) to interpret it to require stadium-style theaters to provide wheelchair-bound moviegoers with comparable viewing angles." 142 F. Supp. 2d at 1297-98. The district court also expressed skepticism that an amicus brief was an appropriate forum to announce an agency's interpretation of a rule in any case. Accordingly, the district court granted summary judgment to the defendants on the plaintiffs' ADA claim, holding that DOJ's interpretation of § 4.33.3 was inconsistent with the regulation and therefore not entitled to deference. This appeal followed.

II. DISCUSSION

A. *Standard of Review*

A grant of summary judgment is reviewed de novo. *See Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Accordingly, the appellate court must determine, viewing the evidence in the light most

5. This continues to be DOJ's interpretation, as explained in its amicus brief in this case.

favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Oliver*, 289 F.3d at 626.

B. Analysis

As this Court has observed,

> We owe agency interpretations of their own regulations substantial deference. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). When the meaning of regulatory language is ambiguous, the agency's interpretation of the regulation controls "so long as it is 'reasonable,' that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150-51 (1991) (internal citations and quotations omitted).

Lal v. Immigration & Naturalization Serv., 255 F.3d 998, 1004 (9th Cir. 2001); *see also id.* at 1004 n.3 (explaining that the assessment of an agency's interpretation of a regulation, as opposed to a statute, presents a different question from the *Chevron* line of cases); *Simpson v. Hegstrom*, 873 F.2d 1294, 1297 (9th Cir. 1989) ("We generally defer to an administrator's interpretation of her own regulations unless it is 'plainly erroneous or inconsistent with the regulation.' ").

In this case, the district court concluded that DOJ's interpretation[6] of § 4.33.3 is so inconsistent with the regulation as to preclude deference — that is to say, that DOJ's interpretation is unreasonable. That conclusion is unwarranted. The language at issue is § 4.33.3's reference to "lines of sight comparable to those for members of the general public." Webster's Third New International Dictionary defines "line of sight," in relevant part, as "a line from an observer's eye to a distant point (as on the celestial sphere) toward which he is looking or directing an observing instrument." *Id.* at 1316 (1993); *see also* Webster's Ninth New Collegiate Dictionary 695 (1991) (same). In the context of a movie theater, this means a line extending from the viewer's eye to the points on the screen where the film is projected, taking into account the angle from the viewer's eye to those points. In its engineering guideline, promulgated in 1994, the SMPTE explained:

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6. Insofar as the district court suggested that an agency interpretation first advanced in an amicus brief is somehow less valid or less entitled to deference than one promulgated elsewhere, this is a position without legal support. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (analyzing the Secretary of Labor's interpretation of a rule articulated in an amicus brief, holding that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.' "); *see also id.* (characterizing this standard as "deferential," and noting that the phrase at issue "comfortably bears the meaning the Secretary assigns"); *Navellier v. Sletten*, 262 F.3d 923, 945 (9th Cir. 2001) ("An agency's interpretation of one of its own rules, including an interpretation expressed in an *amicus* brief, is controlling unless plainly erroneous or inconsistent with the rule.").

Appendix A

> In addition to ensuring that everyone will see well, seating in the effective cine theater must avoid physical discomfort, which occurs when the vertical viewing angle to the top of the screen image is excessive or the lateral viewing angle to the centerline of the screen requires uncomfortable head and/or body position. Since the normal line of sight is 12° to 15° below the horizontal, seat backs should be tilted to elevate the normal line of sight approximately the same amount. For most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35°, and when the horizontal line of sight measured between a perpendicular to his seat and the centerline of the screen exceeds 15°.

SMPTE Engineering Guideline at 4-5. Indeed, the National Association of Theatre Owners ("NATO"), participating in this case as amicus curiae on behalf of the appellees, has advanced a similar conception of "viewing angle." Steven John Fellman, *NATO Position Paper on Wheelchair Seating in Motion Picture Theatre Auditoriums 6* (1994) ("NATO explained that lines of sight are measured in degrees. . . .").[7]

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7. We disagree with the Fifth Circuit's suggestion in *Lara*, 207 F.3d at 789, that it is impossible to parse "comparability" without embarking on subjective judgments of where each individual prefers to sit in a movie theater. The point is this: Able-bodied movie theater patrons in a stadium-style theater may choose from a wide range of viewing angles, most of which are objectively comfortable according to SMPTE standards, regardless of what personal viewing preferences individuals may have *within* that comfortable range. As it currently

(Cont'd)

The question here, then, is whether it is unreasonable for DOJ to interpret "comparable line of sight" to encompass factors in addition to physical obstructions, such as viewing angle. The answer, in light of the plain meaning of the regulation both in general and as understood in the movie theater industry, is "no." We do not accept the *Lara* court's suggestion[8] that the legislative and administrative history of § 4.33.3 compels a different answer.[9] We agree that

(Cont'd)

stands in the theaters at issue, however, wheelchair-bound patrons may sit only in the first few rows, where uncontroverted evidence demonstrates that, not only is the viewing angle objectively uncomfortable for all viewers, but the discomfort is exacerbated for wheelchair-bound viewers relative to able-bodied viewers sitting in the same row. Note that the SMPTE has determined that physical discomfort occurs "for most viewers" when the viewing angle exceeds 35 degrees; the *average* vertical viewing angle for disabled patrons in the subject theaters is 42 degrees. Thus, there is objective evidence that disabled patrons would likely experience discomfort in the theaters in question.

8. Nor are we alone in so doing. *See United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 88 (D. Mass. 2003) ("This Court now rules (notwithstanding the contrary reasoning in the *Lara* decision) that the comparable 'lines of sight' requirement of Section 4.33.3 means that viewing angles must be taken into account.").

9. The Fifth Circuit's reasoning in *Lara*, and the district court's adoption of that reasoning in this case, seems particularly specious in light of the Supreme Court's recent pronouncement on attempts to circumvent plain meaning in construing administrative interpretations. *See Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Danny Keffeler*, __ U.S. __, 123 S. Ct.

(Cont'd)

stadium-style movie theaters were rare in this country until the mid-1990s, and the older theaters, which were built on sloping floors, did not generally create the same kinds of dramatic disparities in vertical viewing angles that stadium-style theaters do. But the fact that DOJ may not have been contemplating viewing-angle issues in the context of stadium-style seating at the time when § 4.33.3 was promulgated is not dispositive. Rather, the issue is whether a broadly-drafted regulation — with a broad purpose — may be applied to a particular factual scenario not expressly anticipated at the time the regulation was promulgated — a question that the Supreme Court has answered in the affirmative. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (holding that, where statutory text is unambiguous, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted) (citing *S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985))). We see no reason to treat regulations differently.

III. CONCLUSION

One of the central goals of Title III of the ADA is to ensure that people with disabilities have access to "the full and equal enjoyment of the goods, services, facilities, privileges,

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(Cont'd)

1017, 1026 (2003) ("While these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift for the sake of reading 'other legal process' in abstract breadth.").

advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). In the theaters at issue in this case, wheelchair-bound movie theater patrons must sit in seats that are objectively uncomfortable, requiring them to crane their necks and twist their bodies in order to see the screen, while non-disabled patrons have a wide range of comfortable viewing locations from which to choose. We find it simply inconceivable that this arrangement could constitute "full and equal enjoyment" of movie theater services by disabled patrons. Yet, in rejecting DOJ's interpretation, this is precisely what the district court in this case held: No matter where in the theater the seats are, and no matter how sharp the viewing angle, so long as there is no physical object standing between the disabled patron and the screen, DOJ is not free to interpret its own regulation as requiring anything more.

We hold that DOJ's interpretation of "lines of sight comparable to those for members of the general public" in § 4.33.3 to require a viewing angle for wheelchair seating within the range of angles offered to the general public in the stadium-style seats is valid and entitled to deference. Accordingly, the judgment of the district court is reversed, and the case is remanded with instructions to enter summary judgment in favor of the plaintiffs on their ADA claim.

REVERSED AND REMANDED.

Appendix A

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

The majority sets up a conflict with the Fifth Circuit,[1] adopts an unreasonable construction of the applicable regulation, and puts theater owners in a position of impossible uncertainty as to what they must do to comply with the law.

Evidently the Justice Department has been unable to sell its litigation position within the executive branch, so it has come to the Ninth Circuit. The statute requires that "[s]tandards included in regulations . . . shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board,"[2] called the "Access Board." The Access Board published a Notice of Proposed Rulemaking in 1999 that it was considering promulgating new regulations for "stadium-style motion picture theaters" because of the frequent placement of wheelchair spaces in the first few rows.[3]

The Access Board notes that "DOJ has asserted in attempting to settle particular cases" that the usual wheelchair placement should be changed to give wheelchair patrons sight lines "equivalent to or better then the viewing angles provided by 50 percent of the seats in the auditorium," by elevating

1. *See Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000).

2. 42 U.S.C. § 12186(c).

3. 64 Fed. Reg. 62,248 62,278 (Nov. 16, 1999).

the wheelchair seats to the stadium section.[4] Far from announcing that DOJ was right about what the existing regulation meant, the Access Board announced that "the Board is considering whether to include specific requirements in the final rule that are consistent with DOJ's interpretation."[5] The Board notes the desirability of affording better sight lines to wheelchair patrons, but also notes that "design professionals have expressed some uncertainty about how to measure their compliance."[6] Balancing these concerns, "the Board is proposing to amend the guidelines to include specific technical provisions" governing sight lines.[7]

It is striking to contrast the just approach of the Access Board with the unjust approach of the majority decision. When and if the Access Board promulgates a regulation, architects will know before a movie theater is built how they must design it, and owners of existing theaters will know what reconstruction they must perform. By contrast, under today's decision, retroactive as judicial decisions generally are, thousands of movie theaters will discover that they are out of compliance with the law, and must destroy facilities built in compliance with the law according to the best knowledge of design professionals at the time. They must rebuild them to satisfy the architectural inferences design

4. *Id.*

5. *Id.*

6. *Id.* at 62,217.

7. *Id.*

professionals will have to draw from today's opinion. Those inferences are obscure and debatable. Though I could come up with a scheme that I think could satisfy the implications of the majority opinion, I am not sure that it would satisfy the majority, and I am entirely unable to say what is the least expensive design that would satisfy the majority. If a judge on the panel cannot say just what is required, how can a movie theater owner? It is irresponsible to impose on the country a decision that will require of an industry so much reconstruction, without clear guidance on what must be done.

We ought to leave the Access Board process alone. If the Access Board adopts the Justice Department's position or something like it, the requirements will be clear, precise and prospective. Though any result might be subject to substantive objections (it is hard to justify a gloss on the statute that requires wheelchair users to have a *better* view than half or more of the seats), at least the result would be obtained after a fair process. Regulating movie theater architecture retroactively by vague judicial fiat is unjust.

The Access Board implicitly acknowledges that the Justice Department is arguing for creation of new law rather than a permissible construction of existing regulations. And the structure of the existing regulations and the timing of the regulation at issue compel this conclusion. The "accessibility guidelines" surrounding § 4.33.3 — the one covering lines of sight — are written with great precision, e.g., telephone cord length must be at least 29",[8] and wheelchair seating knee clearance at tables and counters

8. 28 C.F.R. Part 36, App. A, § 4.31.8.

must be "at least 27 in (685 mm) high, 30 in (760 mm) wide, and 19 in (485 mm) deep."[9] Where a regulation tells movie architects and owners to the millimeter how they must construct knee space, the use of the vague term "comparable" must be looser by intent. It is unreasonable to infer from the regulation on the next page, "lines of sight comparable to those for members of the general public,"[10] something like the "better than 50%" of the seats rule that the Justice Department has suggested.

The majority is rightly troubled by the notion of a wheelchair ghetto in one part of the movie theater with sight lines worse than those of the other patrons. But that concern is a chimera, because the regulation already speaks to that issue. It says that "[w]hen the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location,"[11] and in all theaters, the wheelchair seating has to be an "integral part" of the seating with "lines of sight comparable to those for members of the general public." That means that in the smaller theaters, it is permissible to group the wheelchair seating rather than to distribute it throughout the theater, but that it has to be part of the general seating footprint rather than separated, and the lines of sight cannot be substantially different from those of seats available for the general public. Under the existing regulations, there cannot be a wheelchair ghetto out of the way, behind a post, or off to the side.

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9. *Id.* at § 4.32.3.

10. *Id.* at § 4.33.3.

11. *Id.*

Appendix A

The regulation at issue, in contrast with the highly specific (to the millimeter) requirements of the surrounding regulations, requires that wheelchair areas be "an integral part" of the fixed seating plan, that they "adjoin an accessible route" that also series as an emergency exit, that they be adjacent to "companion" seating, and that they have "lines of sight comparable to those for members of the general public."[12] The majority opinion disregards all the other requirements that give context to the lines of sight requirement, such as the access and emergency exit requirements. These other requirements complicate any construction plans. The "integral part" requirement prohibits a separate and noncontiguous wheelchair ghetto, the companion seating provision prohibits separation of the disabled from friends and family, and the access route provision assures that the disabled can get in and out of the movie theater conveniently and safely (which may require that they be in the flat area in front).

What this case is really all about is the meaning of the word "comparable" in the "lines of sight" regulation. The regulation uses "comparable" in its sense of "similar or equivalent."[13] The question is, "comparable to what?" Evidently the Justice Department position is that "comparable" means "equivalent to or better than the viewing angles . . . provided by 50 percent of the seats."[14] That may or may not be a

12. 28 C.F.R. Part 36, App. A, § 4.33.3.

13. *The American Heritage Dictionary* 300 (2d ed. 1982).

14. 64 Fed. Reg. 62,248 62,278 (Nov. 16, 1999).

reasonable imposition on theater owners, but it is not a natural usage of the word "comparable." "Comparable" does not mean "better than." It means "similar or equivalent." And why "50 percent of the seats?" Why not just "comparable to the viewing angles provided by non-wheelchair seating?" That would be a more natural interpretation of the word "comparable."

Viewing angles differ for every seat in the house. As the Fifth Circuit noted, preferences are highly subjective, and people's preferences differ.[15] Some people like to sit in front, for maximum size of picture and stereo effect of the sound, and to avoid distractions from people in front of them. Some people like to sit in back, for the greater height and sense of separation from the picture. Some like the aisles, so they can get out easily to go to the bathroom or the popcorn stand. Some like the center, so they won't be distracted by the people who get up during the movie to go the bathroom or the popcorn stand. The lines of sight for the wheelchair seats cannot be comparable to all of these, without requiring the scattering of wheelchair seating that the 300-seat provision expressly avoids requiring in small theaters. The wheelchair seats up front are comparable (though as a matter of geometry a line of sight will not be identical to any particular other seat) to the other seats up front, preferred by those patrons who like to sit up front. If the seats up front, or in the back, were uniformly considered undesirable, theaters would have to charge less for them. They don't.

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15. *Lara*, 207 F.3d at 789.

The Fifth Circuit solves this problem by interpreting the line of sight requirement as requiring an unobstructed view.[16] Whether we adopt precisely that reading or not, the regulation plainly does not mean what the Justice Department says it means (and what the majority opinion may or may not imply that it means): "equal to or better than 50 percent of the seats," whatever "better" may mean.

The Fifth Circuit went the other way from the majority in *Lara*, so now we have a circuit conflict. Theater owners in the Ninth Circuit have no guidance from the majority on how to build their theaters, other than to stop doing what they are doing now. A purportedly uniform federal regulation now means something different in the Ninth Circuit from what it means in the Fifth.

Perhaps responding to my concern that a theater owner cannot read the majority opinion and figure out what to do to obey the law, the majority says that the viewing angle for wheelchair seating has to be "within the range of angles offered to the general public." This is evidently the meaning the majority attributes to the words of the regulation, "lines of sight comparable to those for members of the general public."[17] But the majority's gloss on the regulation, besides being something different from what the regulation says, is no help at all to theater owners trying to comply with the law. "[W]ithin the range of angles" does not speak with more clarity than "comparable."

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16. *Id.*

17. *Id.*

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The seating in the theaters before us already does provide wheelchair viewing angles "within the range of angles offered to the general public," so the words the majority uses cannot mean what they say, since the majority directs summary judgment against the theaters. The affidavits establish that because wheelchairs cannot roll up steps, the theaters provide spaces for them "on a flat portion of each auditorium, near the entrance-ways and exits, in front of the tiered seats, amidst seating for the general public." The wheelchair spaces in the challenged theaters "are in one or more of the first five rows." The regular seats right next to the wheelchair spaces provide viewing angles "within the range" of the general seating. The vertical angles are identical. Where there are regular seats to the left and right of a wheelchair seat, it is a geometric certainty that the angle of view from the wheelchair seat will be greater than the angle from one, and less than the angle from the other, so that it is necessarily "within the range of angles" of the two adjacent seats. Of course the theater cannot command the manufacturers of wheelchairs to give them all the same reclining angles as theater seats, and there may be important medical reasons why some wheelchair users would not want that, so to the extent the majority is alluding to its neck-craning concern, that is out of the theater's control. The wheelchair manufacturer and purchaser in substantial part control the vertical viewing angle, and the wheelchair space provided by the movie theater controls the horizontal angle.

Those who use wheelchair spaces in a movie theater bring their own chairs.

All the majority tells us with any clarity is that it is not satisfied with the existing state of affairs, where wheelchair

patrons sit in the front rows. But architects and theater owners need to know, not only what the Ninth Circuit rejects, but what construction and reconstruction will be acceptable. That is why the regulations delimit knee space to the millimeter. Judicial opinions cannot be written that way, which is a good reason why we should not try to rewrite the regulations as the majority does. The majority admits that stadium seating was a "factual scenario not expressly anticipated at the time the regulation was promulgated,"[18] yet construes the regulation to address it. If the regulation did not contemplate stadium seating, the only fair inference is that it did not provide specially for it. Obviously, there was wheelchair seating before stadium seating, and if the regulations did not prohibit a wheelchair section in the front of the theater before, it is impossible to justify a construction that the very same regulation prohibits the very same wheelchair seating, with identical angles of view, after stadium seating came into use.

The least the majority could do in its retroactive legislative effort is offer a holding that can be translated into a floorplan. Today's holding cannot, not least because in theaters where there are seats on both sides of the wheelchair spaces, the result treats as violated a rule that is mathematically certain to have been complied with. What we should do, of course, is conclude as the Access Board evidently has, that the regulation does not now mean what the Justice Department wants it to mean. We know perfectly well that the Access Board is addressing wheelchair spaces and stadium seating, and there is no justification for jumping in front of them.

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18. Majority Opinion at 11253.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED APRIL 30, 2001 AND FILED MAY 1, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 00-485-KI

OREGON PARALYZED VETERANS OF AMERICA, a non-profit corporation, KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Plaintiffs,

v.

REGAL CINEMAS, INC., and EASTGATE THEATRE INC., d/b/a ACT III THEATERS, INC.

Defendants.

OPINION

KING, Judge:

Before the court is the motion for summary judgment (#35) by plaintiffs Oregon Paralyzed Veterans of America, Kathy Stewmon, Tina Smith, and Kathy Braddy. Also before the court is the motion for summary judgment (#37) by defendants Regal Cinemas, Inc. and Eastgate Theatre, Inc., dba Act III Theaters, Inc. (collectively, "Regal"). For the reasons set forth below, I grant defendants' motion for summary judgment and deny plaintiffs' motion for summary judgment.

Appendix B

FACTS

In 1995, Regal began constructing "stadium-style" movie theaters. Stadium-style theaters roughly emulate the seating configuration of a typical sports stadium, providing stepped-seating that rises at a slope of well over five percent. This elevated seating configuration reduces the obstructed view or line-of-sight problems that occur, for example, when a tall individual sits in front of a shorter individual.

The stairs that support the stadium-style seating configurations require a steep grade that generally cannot be navigated by wheelchair-using patrons. Wheelchair-accessible seating is located in front of the tiered seats amidst the seating for the general public in the first five rows of seats. The wheelchair seat locations have an unobstructed view of the movie screen.

In this lawsuit, plaintiffs challenge the wheelchair seat locations in theaters within six theater complexes in northern Oregon owned by Regal. These six complexes have between nine and sixteen theaters and the majority of the theaters have less than 250 seats. Certificates of occupancy and other approvals were issued for each of the theaters by local and state building officials.

Plaintiffs allege that the wheelchair seat locations are in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.* ("ADA"). They also assert a claim under an Oregon public accommodation law (ORS 659.425(3)) and the common law tort of negligence.

Appendix B

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir.), *cert. denied*, 120 S. Ct. 375 (1999).

DISCUSSION

I. *ADA Claim*

As a "public accommodation," Regal's theaters are subject to the requirements of Title III of the ADA. The general rule of Title III provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Newly constructed facilities subject to the ADA must be "readily accessible to and usable by

individuals with disabilities." *Id.*, § 12183(a)(1). Congress has directed the Department of Justice ("DOJ") to "flesh out" these general principles by "issu[ing] regulations . . . that include standards applicable to facilities" covered by Title III. *Id.*, § 12186(b); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 580 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 1184 (1998). DOJ fulfilled this responsibility by adopting guidelines promulgated by the Architectural and Transportation Barriers Compliance Board, known as the "Access Board." The Access Board is charged with "establish[ing] and maintain[ing] minimum guidelines and requirements for the standards issued pursuant to," Title III of the ADA. 29 U.S.C. § 792(b)(3)(B). The regulations adopted by the DOJ are known as the Americans with Disabilities Act Accessibility Guidelines ("ADAAG").

One of the guidelines promulgated by the Access Board, and adopted by DOJ as its own regulation in 1991, states in relevant part as follows:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and *lines of sight comparable* to those for members of the general public.

28 C.F.R. Part 36, App. A, § 4.33.3 (emphasis added).[1]

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1 The State of Oregon's accessibility guidelines, contained in the Uniform Building Code ("UBC"), contain very similar requirements. UBC, § 1109.20.1.1.

Appendix B

At the center of this lawsuit is the meaning of "lines of sight comparable" in Section 4.33.3. Plaintiffs argue that these words impose a viewing angle standard such that wheelchair seating areas must be placed in the stadium seating portion of theaters and not just in the front rows of a theater that provide inferior and uncomfortable viewing angles. Defendants argue that these words do not impose a viewing angle standard and mean only that a patron in a wheelchair must be provided with an unobstructed view of the movie screen.

To date, the major court decisions that have construed "lines of sight comparable" in Section 4.33.3 have addressed the question of whether those words impose a requirement that wheelchair users not have their views obstructed by spectators who may stand in front of them. *Paralyzed Veterans*, 117 F.3d at 583-84 (holding that Section 4.33.3 does require auditorium owners to provide wheelchair areas that have lines of sight unobstructed by standing spectators); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 743 (D. Or. 1997) (holding that Section 4.33.3 "does not purport to decide whether lines of sight over standing spectators are-or are not-necessary in order to comply with the ADA"); *Caruso v. Blockbuster-Sony Music Entertainment Ctr. at the Waterfront*, 193 F.3d 730, 736 (3rd Cir. 1999) (holding that Section 4.33.3 does not reach the issue of sight lines over standing spectators). Only one appellate decision has addressed the issue of whether "lines of sight comparable" requires stadium-style theaters to provide wheelchair-bound moviegoers with comparable viewing angles rather than unobstructed lines of sight. That case is *Lara v. Cinemark USA Inc.*, 207 F.3d 783 (5th Cir. 2000).

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In July 1998, DOJ filed in the *Lara* case an *amicus curiae* brief. In its brief, the DOJ announced a new interpretation of Section 4.33.3, based on its reading of the plain meaning of "comparable lines of sight." The interpretation required the following in stadium-style theaters: "wheelchair locations must be provided lines of sight in the stadium seating seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt." Defendants' Exh. L, p. 8.

The district court granted summary judgment in favor of the plaintiffs and the defendant appealed that decision. On appeal, DOJ again filed an *amicus* brief espousing its new interpretation of Section 4.33.3 with respect to wheelchair locations in stadium-style theaters.

On April 6, 2000, the Fifth Circuit issued its opinion in the *Lara* case and reversed the district court. On October 16, 2000, the Supreme Court denied the plaintiffs' petition for writ of certiorari. *Lara v. Cinemark USA, Inc.*, 121 S. Ct. 341 (2000).

Notwithstanding the Fifth Circuit's rejection of the DOJ's litigating position in *Lara*, plaintiffs essentially adopt DOJ's litigating position as their own in this case. They ask that I view DOJ's litigating position in the *Lara* case as its latest interpretation of Section 4.33.3 and also ask that I pay deference to that interpretation.

Before launching into a discussion of whether deference is due to DOJ's interpretation of Section 4.33.3 as announced in the *Lara v. Cinemark* litigation, I believe it is important to

emphasize that neither the district court nor the Fifth Circuit analyzed the issue in such a way. The district court reasoned that:

> [T]he statute and regulation appear to be clear and unambiguous, and the words thereof can be interpreted in their common, ordinary, English language, dictionary meaning. "Comparable" simply means capable of being compared; equivalent or similar. The Plaintiffs contend that this language means that the wheelchair-bound patrons should and must be afforded seating providing lines of sight at least similar to those afforded to the average person of the theater rather than being relegated to the worst seats in the house. * * * The Court agrees with the Plaintiffs' interpretation of the word "comparable" as used in the regulation. . . .

Lara v. Cinemark USA, Inc., 1998 WL 1048497, *2 (W.D. Tex).

On this basis, and without any discussion of the history of Section 4.33.3, the court concluded that the viewing angles provided by the wheelchair seating at issue in the case did not provide "comparable lines of sight" as required by Section 4.33.3. *Id.*

In rejecting the district court's "plain meaning" analysis, the Fifth Circuit in *Lara* examined the history of Section 4.33.3. The court noted that, unlike questions of "viewer obstruction," which DOJ and the Access Board explicitly considered before issuing Section 4.33.3, questions regarding

"viewing angle" did not arise until well after DOJ adopted Section 4.33.3. *Lara*, 207 F.3d at 788. The court went on to note that such a distinction is evident in DOTs 1994 Technical Assistance Manual (and its supplement) which explicitly requires certain auditoria to provide "lines of sight over spectators who stand," but says nothing about viewing angles. *Id.* The court also emphasized that the Access Board's recent (1999) proposed modifications to Section 4.33.3 were in the context of obstructed views rather than viewing angles and that the Access Board had considered in 1999 the possibility of amending Section 4.33.3 to add requirements that would codify. DOJ'S position that Section 4.33.3 imposes viewing angle standards in stadium-style theaters. *Id.* Finally, the court noted that, in other statutory contexts at the time DOJ adopted Section 4.33.3, the phrase "lines of sight" meant unobstructed view. *Id.* at 788-89. The court concluded:

> In light of the lack of any evidence that the Access Board intended section 4.33.3 to impose a viewing angle requirement, the Board's recent statement that it had not yet decided whether to adopt the DOJ's litigating position with respect to stadium-style theaters, and the common meaning of "lines of sight," we cannot conclude that the phrase "lines of sight comparable" requires anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen.

Id. at 789.

As tempting as it is to rely on the "plain meaning" of the regulation, I find the reasoning of the Fifth Circuit in *Lara* to be persuasive, given its reliance on the history of Section 4.33.3 and the context in which it was promulgated. The logic of the decision is amplified by plaintiff's acknowledgment that the stadium riser design was not adopted for movie theaters until 1995-four years after Section 4.33.3 was adopted by DOJ. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 3.

The *Lara* court's reasoning is also dispositive of plaintiffs' argument that I should show deference to DOJ's interpretation of Section 4.33.3.[2] An agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905 (1997). Under this standard, the applicable analysis is similar to that applied to an agency's interpretation of an ambiguous statute under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). *See Paralyzed Veterans*, 117 F.3d at 584 ("After all, *Chevron* requires a reviewing court to affirm a permissible (or reasonable) interpretation of an ambiguous statute, and we very much doubt that we would

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2. I acknowledge defendants' argument that the viewing angle standard that plaintiff advocates is different from what DOJ asserted in the *Lara v. Cinemark* litigation and that DOJ has articulated different viewing angle standards at different times. Because I find that no viewing angle standard is imposed by Section 4.33.3, I do not reach this "moving target" argument. I do note, however, that the vague viewing angle standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking rather than through an interpretative rule.

defer to an unreasonable agency interpretation of an ambiguous regulation."). Assuming DOJ'S litigating position in the *Lara v. Cinemark* litigation is a suitable way to announce an interpretive rule, the Fifth Circuit's analysis in *Lara* demonstrates that it would be unreasonable and inconsistent with the history of Section 4.33.3 (including statements by the Access Board) to interpret it to require stadium-style theaters to provide wheelchair-bound moviegoers with comparable viewing angles. *See Caruso*, 193 F.3d at 736 (rejecting DOJ's interpretation in 1994 Technical Assistance Manual because of indications that the agency had a different intent (based on comments by the Access Board) at the time Section 4.33.3 was promulgated); *Independent Living Resources*, 982 F. Supp. at 742 (same). Summary judgment is granted against plaintiffs' ADA claim.[3]

II. *Claim Under ORS 659.425(3)*

Plaintiffs allege that "[b]y failing to provide wheelchair seating with lines of sight that are comparable to that of the general public, Defendants have made a distinction,

3. This ruling encompasses plaintiffs' argument that the wheelchair seats are not "an integral part of any fixed seating plan" in the theaters at issue. 28 C.F.R Part 36, App. A, § 4.33.3. I do not read plaintiffs' First Amended Complaint to state such a theory of liability under the ADA. Regardless, the argument is belied by the Fifth Circuit's holding in *Lara* that, to locate wheelchair seating in the non-stadium portion of seats used by the general public, does not violate the ADA. *Lara*. 207 F.3d at 789. I also reject plaintiffs' reliance on the "full and equal enjoyment" language in 42 U.S.C. § 12182(a). Instead, I subscribe to defendants' argument that compliance with ADAAG (the implementing regulations for the ADA) is compliance with the ADA itself.

discrimination or restriction on Plaintiffs because they are disabled persons, in violation of ORS 659.425(3)." First Amended Complaint, ¶ 51. That statute provides: "It is an unlawful practice for any place of public accommodation, resort or amusement as defined in ORS 30.675, or any person acting on behalf of such place, to make any distinction, discrimination or restriction because a customer or patron is a disabled person."

As defendants point out, the Honorable Donald C. Ashmanskas ruled in *Independent Living Resources* that this statute was not intended to provide a right to recover damages for deficiencies in the design of a structure and that "the language of the statute . . . suggests active conduct of some sort, especially conduct that is targeted at a specific individual." *Independent Living Resources*, 982 F. Supp. at 773. Likewise, the Honorable Robert E. Jones has ruled that the statute does not impose a "reasonable accommodation" requirement for public accommodations. *Sellick v. Denny's Incorporated* 884 F. Supp. 388, 393 (D. Or. 1995). As recently as January 2000, the Honorable Dennis J. Hubel relied on these decisions to dispose of a claim under ORS 659.425(3). *Alford v. City of Cannon Beach*, 2000 WL 33200554, * 14-15 (D. Or. January 17, 2000). I am inclined to follow these decisions from this district and, accordingly, grant summary judgment against plaintiffs' claim under ORS 659.425(3).

III. *Negligence Claim*

Plaintiffs assert that "[d]efendants had a duty, imposed by federal and state law, to design, construct and operate their

theaters in compliance with Title III of the ADA and the State Public Accommodations Law." First Amended Complaint, ¶ 58. However, in their response to defendants' motion for summary judgment, plaintiffs concede that "the ADA's regulatory scheme is broad enough to preclude Plaintiff from seeking recovery on a negligence claim for violation of the ADA." Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 18. Furthermore, based on the above analysis, the "public accommodation law" on which plaintiffs rely (ORS 659.425(3)) does not apply and, thus, cannot supply the duty element necessary for plaintiffs' negligence claim.

Plaintiffs attempt to get around these problems by arguing in their opposition brief that it is actually the Uniform Building Code that supplies the necessary duty element. However, plaintiffs are unable to identify any particular building code standard, in effect at the time of the construction of the theaters, that was not satisfied. Plaintiffs' claim also suffers from the fact that none of plaintiffs can claim a physical injury. *See Alford*, 2000 WL 33200554, *19. Summary judgment is granted against plaintiffs' negligence claim.

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CONCLUSION

Based on the foregoing, the motion for summary judgment (#35) by plaintiffs Oregon Paralyzed Veterans of America, Kathy Stewmon, Tina Smith, and Kathy Braddy is DENIED. The motion for summary judgment (#37) by defendants Regal Cinemas, Inc. and Eastgate Theatre, Inc., dba Act III Theaters, Inc. is GRANTED.

DATED this 30th day of April, 2001.

s/ Garr M. King
GARR M. KING
United States District Judge

APPENDIX C — STATUTORY PROVISIONS AND REGULATIONS INVOLVED

CHAPTER 126—EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 U.S.C. § 12183

§ 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term

Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—

> **(1)** a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter;

* * * *

Appendix C

42 U.S.C. § 12186

§ 12186. Regulations

* * *

(b) Other provisions

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

(c) Consistency with ATBCB guidelines

Standards included in regulations issued under subsections (a) and (b) of this section shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

(d) Interim accessibility standards

(1) Facilities

If final regulations have not been issued pursuant to this section, for new construction or alterations for which a

valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

* * * *

Appendix C

42 U.S.C. § 12204

§ 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter.

* * * *

Appendix C

42 U.S.C. § 12206

§ 12206. Technical assistance

(a) Plan for assistance

(1) In general

Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

(2) Publication of plan

The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of Title 5 (commonly known as the Administrative Procedure Act).

* * * *

Appendix C

AMERICANS WITH DISABILITIES ACT ACCESSIBILITY GUIDELINES

4.33.3 Placement of Wheelchair

Locations. Wheelchair areas shall be an integral part of any fixed seating plan and shall be *provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.* They shall adjoin an accessible route that also serves as a means of egress in case of emergency. *At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.*

EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

* * * *

Appendix C

PROPOSED RULES

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Parts 1190 and 1191

[Docket No. 99–1]

RIN 3014–AA20

Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines

Tuesday, November 16, 1999

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) is proposing to revise and update its accessibility guidelines for buildings and facilities covered by the Americans with Disabilities Act of 1990 (ADA) and the Architectural Barriers Act of 1968 (ABA). These guidelines cover new construction and alterations and serve as the basis for enforceable standards issued by other Federal agencies. As a result of this revision and update,

the guidelines for the ADA and ABA are consolidated in one Code of Federal Regulations part. The guidelines for the ABA also cover buildings and facilities leased by Federal agencies. The Department of Justice and the Department of Transportation are responsible for issuing standards based on the Access Board's guidelines under the ADA. ABA standards are issued by the Department of Defense, General Services Administration, the Department of Housing and Urban Development, and the U.S. Postal Service.

* * *

The Board is aware of the Department of Justice's enforcement of 4.33.3 with respect to assembly areas with stadium-style seating. DOJ has stated that 4.33.3 requires that wheelchair areas be an integral part of any fixed seating plan, and be proved so that people with disabilities have lines of sight and choice of admission prices comparable to those for other members of the general public. As applied to stadium-style theaters (where most seats are placed on tiers or risers to enhance viewing), DOJ has asserted in attempting to settle particular cases that wheelchair seating locations must: (1) Be placed within the stadium-style section of the theater, rather than on a sloped floor or other area within the auditorium where tiers or risers have not been used to improve viewing angles; (2) provide viewing angles that are equivalent to or better than

the viewing angles (including vertical, horizontal, and angle to the top of screen) provided by 50 percent of the seats in the auditorium, counting all seats of any type sold in that auditorium; and (3) provide a view of the screen in terms of lack of obstruction (e.g., a clear view over the heads of other patrons), that is in the top 50 percent of all seats of any type sold in the auditorium. The Board is considering whether to include specific requirements in the final rule that are consistent with DOJ's interpretation of 4.33.3 to stadium-style movie theaters.

* * * *

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DISTRICT IN *UNITED STATES OF AMERICA v. CINEMARK USA, INC.* DATED NOVEMBER 19, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:99 CV- 705

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINEMARK USA, INC.

Defendant.

JUDGE DONALD C. NUGENT

MEMORANDUM OPINION AND ORDER

This case arises under Title III of the Americans with Disabilities Act (the "ADA") and is before the Court upon cross motions by the parties for summary judgment. Defendant Cinemark USA, Inc. ("Cinemark") filed its second motion for summary judgment on December 11, 2000 (docket no. 70). Plaintiff, the United States, filed a cross motion for partial summary judgment on January 18, 2001 (docket no. 78). For the reasons stated below, the government's motion for partial summary judgment is DENIED. Defendant's second motion for summary judgment is GRANTED.

Appendix D

Facts

The following facts are not in dispute. Cinemark is a Texas corporation that constructs, owns and operates movie theater multiplexes throughout the United States. In 1995, Cinemark began constructing and operating "stadium-style" movie theaters. Stadium style theaters roughly emulate the seating configuration of a typical sports stadium, providing "stepped seating" that rises at a slope of over five percent. This elevated seating configuration eliminates the "obstructed" view problems that occur, for example, when a tall individual sits in front of a shorter individual. By contrast, traditional style seating is placed on a sloped floor.

Cinemark operates stadium-style theaters nationwide, including in Ohio. Cinemark currently operates 71 stadium-style movie theater multiplexes throughout the United States, each of which contains between 7 and 24 screens. Cinemark provides wheelchair accessible seating in its stadium-style theaters, but not as part of the stadium seating configuration. Wheelchair accessible seating in Cinemark's stadium-style theaters is located on a flat portion of each theater near the front of the seating area, generally at or about the third row of the theater. The wheelchair accessible seating is in front of the tiered, "stadium-style" seats.[1] The wheelchair seating is placed near entranceways and exits.

The government filed this action against Cinemark on March 24, 1999, alleging that Cinemark's stadium-style

1. In Cinemark's stadium style movie theater auditoriums with 300 or more seats, wheelchair seating is also provided via elevator access to seats at the rear of the theater.

theaters deny access to persons with disabilities who use wheelchairs in violation of Title III of the ADA and its implementing regulations. The government seeks a declaration that Cinemark has violated the ADA in the design and construction of its movie theaters in Ohio and throughout the United States; an order that Defendant undertake repairs of its stadium-style theaters to bring them into compliance with the ADA; an injunction against Cinemark from taking any further action in designing or constructing stadium-style theaters that do not comply with the ADA, a civil penalty, and compensatory damages for those persons with disabilities who were discriminated against by Cinemark. (Complt. Prayer for Relief.)

Cinemark denies that its theaters violate the ADA.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." *Id.*

The moving party has the initial burden of proving that no genuine issue of fact exists and that the moving party is entitled to judgment as a matter of law. To meet this burden, the moving party may rely on any of the evidentiary sources listed in Rule 56(c) or may merely rely upon the failure of the nonmoving

party to produce any evidence which would create a genuine dispute for the jury. If the moving party satisfies its burden, then the burden of going forward shifts to the nonmoving party to produce evidence that results in a conflict of material fact to be resolved by a jury. A scintilla of evidence in support of the nonmoving party's position is not enough. There must be evidence from which a reasonable jury could find for the nonmoving party. If the evidence is insufficient to reasonably support a verdict in favor of the nonmoving party, the motion for summary judgment will be granted. In considering a motion for summary judgment, the Court must afford all reasonable inferences, and construe the evidence in the light most favorable to the nonmoving party. *Cox v. Kentucky Dept. of Transportation*, 53 F.3d 146, 149-150 (6th Cir. 1995).

Discussion

The government moves for partial summary judgment only with respect to "Cinemark auditoriums with both stadium-style and traditional seating, where all wheelchair accessible seating is provided in the non-stadium style section, *i.e.*, in auditoriums that seat fewer than 300 persons." (Gov. Mem. at 2.)[2] The government contends these theaters violate Title III of the ADA and its implementing regulations.[3]

2. Although the government does not specifically identify which of Cinemark's theaters are of this type, Cinemark submits affidavit testimony that only its "first generation" theaters fall within this description. (Supp. Harton Aff. Ex. B ¶ 4.) All of Cinemark's "first generation" theater complexes were approved, fully constructed and opened for business by March 1998. *Id.*

3. There is no dispute that Cinemark's stadium-style theaters are "public accommodations" subject to Title III of the ADA.

First, the government contends Cinemark's theaters violate Section 302 of the ADA. Section 302(a) provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns . . . or operates a place of public accommodation.

42 U.S.C. § 12182(a).

Section 302(b) of the ADA sets forth a number of acts and omissions which constitute discrimination under Section 302(a), including affording individuals with disabilities "the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals" and providing individuals with disabilities "a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals. . . ." 42 U.S.C. § 12182(b)(ii), (iii). Section 302(B) requires that goods, services and facilities "be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. § 12182(B).

The government asserts that Cinemark's placement of wheelchair accessible seating only in traditional seating on the sloped portion of theater near the front of the theater violates these provisions. It contends that the seating provided

to wheelchair patrons is unequal and inferior to the stadium-style seats offered non-wheel chair patrons. In particular, the government asserts that stadium-style seating provides superior sightline advantages not available in traditional seats. Thus, wheelchair patrons who go to Cinemark's theaters pay the same administration price as non-disabled patrons, but must chose a seat in the front of the theater where the viewing angle to the screen is not as comfortable as in the stadium-style seats. The government states:

> [P]atrons who use wheelchairs must sit near the front of the auditorium, close to the wall-to-wall screen, and separated from most of the general public seated behind them on the elevated risers of stadium seating. When the movie begins, these patrons are forced to shift in their chairs, tilt their heads back at an uncomfortable angle, or move their heads from side to side many times per minute in order to capture the action on the enlarged stadium theater screen directly in front of them.

(Gov. Mem. at 21.)

The government also contends Cinemark's theaters violate Section 303 of the ADA and its implementing regulations. Section 303 of the ADA pertains to new construction and alterations in public accommodations. *See* 42 U.S.C. § 12183. Section 303 provides that it shall be discriminatory under the ADA to design and construct public accommodations and commercial facilities that fail to comply with standards issued by the Department of Justice. 42 U.S.C.

§ 12183(a)(1). Congress expressly charged the DOJ with responsibility for issuing final regulations that include accessibility standards for newly constructed and altered places of public accommodation and commercial facilities. 42 U.S.C. § 12186(b). In Section 504 of the ADA, Congress required the Architectural and Transportation Barriers Compliance Board (the "Access Board") to issue guidelines to provide guidance to the DOJ in establishing those standards: 29 U.S.C. § 792(b). The ADA requires the DOJ's standards to be consistent with the Access Board's guidelines. 42 U.S.C. § 12186(c).

On July 26, 1991, the Access Board published the Americans with Disabilities Act Accessibility Guidelines, known as "the ADAAG" 56 Fed. Reg. 35408, 36 C.F.R. Part 1191. On the same day, the DOJ published final regulations implementing Title III of the ADA, which incorporated the ADAAG without revision. 28 C.F.R. Part 36.

Section 4.33.3 of the ADAAG pertains to the placement of wheelchairs and provides:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be

> installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.
>
> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having slope lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

28 C.F.R. Ch. I, Pt. 36, App. A, § 4.33.3.

The government contends Cinemark's theaters violate the requirements of Section 4.33.3 that wheelchair areas "be an integral part of any fixed seating plan" and provide people with disabilities "lines of sight comparable to those for members of the general public."

The government asserts that to be an integral part of the fixed seating plan as required by Section 4.33.3, a wheelchair space in a stadium style theater must "be part of the auditorium seating where members of the public routinely sit." (Gov. Mem. at 24.) The government asserts that "[i]n stadium-style theaters, the general public sits primarily in stadium-style seats." Thus, the government contends, Section 4.33.3 requires that wheelchair spaces be afforded in stadium-style seats.

The government contends that to provide lines of sight comparable to those provided to the general public, Cinemark must afford wheelchair patrons seating that provides "viewing angles, distance to the screen, obstruction of view

and distortion of images" comparable to that offered to "most members of the general public." (Gov. Mem. at 26.) The government contends that the location of the wheelchair seating in Cinemark's theaters is among the worst in the house and offers lines of sight inferior to those provided most members of the general public who sit in the stadium-style seats.

The government asks the Court to "grant partial summary judgment rulings" as follows:

> (1) That Section 302 of the ADA and its implementing regulations, 28 C.F.R. §§ 36.201, 36.202, and 36.203 prohibit movie theater owners and operators from excluding people who use wheelchairs from seating in the stadium-style sections of a theater auditorium while offering such seating to the general public;
>
> (2) That Cinemark has violated Section 303 of the ADA and 28 C.F.R. §§ 36.201, 36.202, and 36.203 in its auditoriums that seat fewer than 300 persons and that individually include both stadium-style and non-stadium style seating, by allowing members of the-general public access to stadium-style seats while denying persons who use wheelchairs access to the stadium-style section of the theater;
>
> (3) That Section 303(a) of the ADA, 42 U.S.C. § 12183(a) and its implementing regulation, 28 C.F.R. Subpart D and Standard 4.33.3 which

require that wheelchair seating be an integral part of any fixed seating plan, mandate that in a stadium-style theater, the required number of wheelchair spaces must be provided in the stadium-style section of the theater;

(4) that Cinemark has violated these provisions in constructing and altering stadium-style theaters by placing wheelchair seating areas in the non-stadium-style portion of the theaters;,

(5) That Section 303(a) of the ADA, 42 U.S.C. § 12183(a) and 28 C.F.R. Subpart D and Standard 4.33.3 mandate newly constructed and altered movie theaters with stadium-style seating to provide wheelchair spaces with lines of sight comparable to those for members of the general public; and

(6) That Cinemark has violated these provisions in movie theaters with stadium-style seating by failing to provide lines of sight for wheelchair users that are within the range of viewing angles provided to most members of the general public.

(Gov. Mem. at 34-35.)

Cinemark opposes the government's motion and moves for summary judgment in its favor on all of the ADA claims alleged against it. Cinemark contends its theaters comply with the ADA because they satisfy the requirements of the ADAAG, which sets forth the standards newly constructed buildings must follow in order to comply with the ADA.

Appendix D

Cinemark relies on the Fifth Circuit's decision in *Lara, et al. v. Cinemark USA, Inc.*, 207 F.3d 783, *cert. denied*, 531 U.S. 944 (2000).

In *Lara*, a group of individuals with disabilities and two disability rights activist groups filed suit against Cinemark alleging that the wheelchair placements in Cinemark stadium-style movie theaters in El Paso, Texas violated state and federal accessibility laws. In *Lara*, as here, Cinemark located wheelchair accessible seating on the sloped floor near the front of the theaters and in front of the stadium-style seats. Plaintiffs alleged, as the government alleges here, that Cinemark's wheelchair seating was uncomfortable, too close to the screen and was inferior in terms of viewing angle to the screen to the view offered in the stadium-style seats.

The Fifth Circuit held that Cinemark's theaters complied with Section's 4.33.3's requirement that wheelchair patrons be provided "lines of sight comparable to those for members of the general public." The Court held that Section 4.33.3 does not require movie theaters to provide disabled patrons with the same viewing angles available to the majority of non-disabled patrons. Instead, the Court held, the "lines of sight comparable" phrase in Section 4.33.3 required only that wheelchair-bound patrons be provided unobstructed views of the screen. *Lara*, 207 F.3d at 789.

The *Lara* Court reasoned that in contrast to questions of viewer obstruction which the Access Board and the DOJ explicitly considered before issuing Section 4.33.3, questions regarding "viewing angle" did not arise until well after the DOJ issued Section 4.33.3. *Id.* at 788. The Court also found

that although the phrase "lines of sight" lacked a clear meaning in the ADA context at the time the DOJ adopted Section 4.33.3, in other contexts the phrase meant "unobstructed view." *Id.* Finally, the Court found significant language by the Access Board in a Notice of Proposed Rulemaking published in the Federal Register on November 16, 1999. *Id.*, *citing* 64 Fed. Reg. 62248, at 62278 (Nov. 16, 1999). The Board stated in the Notice that it was aware the DOJ had taken the position in attempting to settle particular cases involving stadium-style seating that wheelchair seating must be located in the stadium-style sections and provide viewing angles provided by 50 percent of the seats in the auditorium and a view of the screen in terms of lack of obstruction in the top 50 percent of all seats sold in the theater. The Board stated, however, that it was "*considering* whether to include specific requirements in the final rule that are consistent with the DOJ's interpretation of 4.33.3 to stadium-style movie theaters." *Id.* (emphasis added.) The Court found this language to indicate recognition by the Access Board that modification to Section 4.33.3 was necessary in order to codify the DOJ's "litigating position." The Court held that because the evidence did not show that the Access Board intended current Section 4.33.3 to impose a viewing angle requirement, the phrase "lines of sight" in Section 4.33.3 did not require anything more than that theaters provide wheelchair-bound patrons unobstructed views of the screen. *Lara*, 207 F.3d 789.

Cinemark contends *Lara* is highly persuasive authority here "since all of the DOJ's claims are . . . predicated on the same 'litigating position' rejected by the Fifth Circuit in *Lara* and since all of Cinemark's stadium-style movie theaters meet

the accessibility criteria held by the Fifth Circuit to be legal," *i.e.*, that wheelchair be patrons be afforded seating with unobstructed views of the screen amidst seating for the general public. (Cinemark Mem. at 11.)

Cinemark also maintains that it entitled to summary judgment on the basis of estoppel, and it asserts that the DOJ's "attempt to impose new construction requirements for wheelchair-accessible seating through litigation violates the Administrative Procedure Act." (Cinemark Mem. at 17.) Cinemark asserts that since it was granted accessibility approvals for its stadium-style movie theaters in Texas under Texas's accessibility guidelines, and the DOJ certified Texas's guidelines as "meeting or exceeding the standards of the ADAAG," the DOJ should be estopped from asserting a litigating position here that "summarily invalidates state and local accessibility approvals already granted under [the DOJ's] own state code certification program after Cinemark has relied on them." (Cinemark Mem. at 13.) Cinemark contends that the doctrine of collateral estoppel applies to bar the government's claims because the DOJ was actively involved in the *Lara* lawsuit in which the Court rejected the government's litigating position. At a minimum, Cinemark contends, *Lara* is binding as to all Cinemark theaters located within the Fifth Circuit.

This Court finds the reasoning of the *Lara* Court persuasive. The government has not persuaded the Court that either the DOJ or the Access Board intended Section 4.33.3 to encompass viewing angle. Like the *Lara* Court, this Court finds the comments of the Access Board in its November 16, 1999 Notice of Proposed Rulemaking particularly significant.

Appendix D

In its 1999 Notice of Proposed Rulemaking, the Access Board acknowledged its awareness of the DOJ's "litigating position" with respect to stadium-style theaters, but stated that it was *considering* whether Section 4.33.3 should be modified to reflect the DOJ's position. The Access Board stated:

> Stadium-style motion picture theaters comprise a type of assembly area that has become increasingly popular in the last several years. They provide the general public with sight lines to the screen that generally are superior to those offered in traditional-style motion picture theaters. Stadium-style theaters provide improved viewing in one key way: they furnish an **unobstructed view** of the entire screen through the utilization of relatively high risers that furnish **unobstructed viewing** over the heads of the persons seated in the rows ahead . . .
>
> The Board is aware of the [DOJ]'s enforcement of [Section] 4.33.3 with respect to assembly areas with stadium-style seating. DOJ has stated that 4.33.3 requires that wheelchair areas be an integral part of any fixed seating plan, and be provided so that people with disabilities have lines of sight and a choice of admission prices comparable to those for other members of the general public. As applied to stadium-style theaters . . . DOJ has asserted in attempting to settle particular cases that wheelchair seating locations must: (1) Be placed within the stadium-style section of the theater, rather than on a sloped floor of other area within

> the auditorium where tiers or risers have not been used to improve viewing angles; (2) provide viewing angles (including vertical, horizontal, and angle to the top of screen) provided by 50 percent of the seats in the auditorium; and (3) provide a view of the screen, in terms of lack of obstruction (e.g., a clear view over the heads of other patrons), that is in the top 50 percent of all seats of any type sold in the auditorium. **The Board is considering whether to include specific requirements in the final rule that are consistent with the DOJ's interpretation of 4.33.3 to stadium-style movie theaters.**

64 Fed. Reg. at 62278 (emphasis added.) Significantly, the Board explained the superior nature of stadium seating in terms of unobstructed views, and acknowledged that changes to current law were necessary to codify the DOJ's litigating position.

The Access Board also stated in its Notice that it was "considering whether to provide additional guidance on determining whether lines of sight are comparable in assembly areas." The Board further stated:

> When the dispersion of wheelchair spaces is not required (*i.e.*, in small assembly areas) the placement of the wheelchair spaces in relation to other seating acquires greater significance because wheelchair users are not offered a choice of viewing angles. Therefore . . . **it may be necessary** for wheelchair spaces not only to

> provide lines of sight comparable to those provided to spectators seated in the same area, but also to provide lines of sight that are comparable to those provided for most of the other patrons in the assembly area. Consequently, the Board is **considering** specifying that wheelchair spaces in assembly areas, where dispersion is not required, must be located so that the lines of sight provided are comparable to (*i.e.*, equal to or better than) the lines of sight provided to the "majority" of the patrons in the assembly area.

Id.

This Court finds the comments by the Access Board in its recent Notice evidence that the DOJ's position with respect to Cinemark's stadium style theaters is not embodied in current Section 4.33.3.

The government contends that the Court should defer to its interpretation of its regulation. However, "[a] court should not defer to an agency's interpretation of its own regulation if an alternative reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Caruso v. Blockbuster-Sony Music Ent. Centre*, 193 F.3d 730 (3rd Cir. 1999), *quoting Thomas Jefferson University v. Shalala*, 512 U.S. 404, 512 (1994). In that the Court does not find the "lines of sight comparable" language contained in current Section 4.33.3 to encompass particular viewing angles or distance from the screen as the DOJ asserts, the Court does not agree with the government that Cinemark's theaters violate the lines of sight comparable

phrase in Section 303(a) of the ADA and 28 C.F.R. Subpart D and Standard 4.33.3 by failing to place wheelchair accessible seating in the stadium-style portion of its theaters.

The Court also does not find that Cinemark's placement of the wheelchair seating in its theaters violates the "integral part" requirement of Section 4.33.3. The Court does not find that the legislative record shows that the integral part requirement pertains to particular viewing angles. In its Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, the DOJ explained integration of wheelchairs not in terms of having viewing angles better than 50% of the seats in an assembly area, but in terms of wheelchair patrons being able to sit near family and friends. *See* 28 C.F.R. Part 36, App. B § 36.308 ("Individuals who use wheelchairs historically have been relegated to inferior seating in the back of assembly areas separate from accompanying family members and friends. The provisions of § 36.308 are intended to promote integration and equality in seating.") Cinemark's theaters do not place wheelchair patrons in the back of the assembly area apart from family and friends.

For the reasons stated above and those stated by the Fifth Circuit in *Lara*, the Court does not find that Cinemark's theaters violate Section 303 of the ADA and its implementing regulations.

The Court also does not find that Cinemark's theaters violate Section 302 of the ADA. The Court agrees with Cinemark that it would be illogical and unfair to find a violation of Section 302 of the ADA based on the design and

construction of a public accommodation where the accommodation has been shown to comply with Section 303 of the ADA and all of the technical requirements of the ADAAG (which was promulgated for the very purpose of assisting covered entities in understanding their responsibilities with respect to the design and construction of new facilities). The government maintains that compliance with Section 303 is not always sufficient to comply with all of the mandates of Title III. It maintains, for example; that it would be absurd to find that an owner or operator complied with all aspects of the ADA because it designed and constructed its facility in full compliance with all relevant technical guidelines where the owner or operator denies persons who use wheelchairs access to the facility. (Gov. Rep. in Supp. at 6.) This example is not relevant here. Here, the government's Section 302 claim is based on the design and construction of Cinemark's stadium-style theaters, not on allegations its has denied wheelchair patrons access to its facilities. The ADAAG sets forth the standards for the design and construction of new facilities in order to satisfy the ADA. *See* 42 U.S.C. § 12183(1); 42 U.S.C. § 12204. Thus, compliance with Section 303 and the ADAAG demonstrates compliance with the Section 302 in the context of the allegations here. The government has cited no authority supporting the position that a violation of Section 302 may exist based on the design and construction of a facility where the facility complies with Section 303 and the ADAAG.

As the Court does not find that the government has shown that Cinemark's theaters violate either Sections 302 and 303 of the ADA and their implementing regulations as a matter of law, the government's motion for partial summary judgment is denied.

This leaves Cinemark's motion for summary judgment. Cinemark contends summary judgment in its favor is appropriate with respect to all of its stadium-style multiplexes across the nation because the DOJ's claims in this lawsuit are predicated on the same "litigating position" rejected by the Fifth Circuit in *Lara*, and "all of Cinemark's movie theaters meet the accessibility criteria held by the Fifth Circuit to be legal," *i.e.*, that wheelchair accessible seating provides nonobstructed views of the screen in seating amidst seating for the general public. (Cinemark Mot. in Supp. at 11.) Cinemark relies on the affidavit testimony of its Vice President of Design and Construction, Don Harton. (Def. App. Ex. A.) In paragraph 7 of his affidavit, Mr. Harton states:

> The wheelchair-accessible seating locations at all of Cinemark's stadium-style movie theaters provides wheelchair-using patrons with unobstructed views of the screen. The wheelchair seating is located amidst general public seating in all but nine of Cinemark's multiplexes (covering a total of 52 auditoria). The wheelchair seating in these 52 auditoria is located on the first row of the movie theater and adjoins general public seating. A summary review of "as-built" designs produced to the DOJ shows this to be true, and I also know this to be true due to my position with Cinemark and personal visits to many of these movie theaters.

(Harton Aff. ¶ 7.)

The government does not point to evidence (or indeed even argue) in its opposition brief that Mr. Harton's statement

is incorrect or that some or all of Cinemark's theaters fail to provide wheelchair patrons unobstructed views of the screen.[4] The government moved, however, in a separate motion to strike paragraph 7 of Harton's affidavit and other evidence submitted by Cinemark. (Docket no. 75.) The government contends that paragraph 7 of Mr. Harton's affidavit should be stricken because the phrase "unobstructed views of the screen" as used by the Fifth Circuit in Lara has a specialized legal meaning requiring expert testimony, and Mr. Harton is not qualified as an expert in accessibility issues and the application of the ADA. The government contends that Mr. Harton's opinions regarding the phrase unobstructed views are "legal conclusions and go beyond Mr. Harton's capacity to testify as a lay witness." (Br. in Supp. of Mot. to Strike at 6.)[5]

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4. The government's position in its opposition brief, as it was in support of its own motion for summary judgment, is that the *Lara* decision is incorrect, and the integration and comparable lines of sight phrases in Section 4.33.3 require Cinemark to provide wheelchair accessible seating in the stadium-style sections of its theaters and viewing angles equivalent or better than 50% of the seats. (Gov. Opp. at 5, 7-8.) As stated above, this Court does not agree with the government's interpretation of Section 4.33.3.

5. The government further states that if the Court accepted the Fifth Circuit's interpretation of the comparable lines of sight requirement in Section 4.33.3 (*i.e.*, that wheelchair bound patrons must be afforded "unobstructed views of the screen"), the parties would still need to litigate precisely what it means to have an "unobstructed view of the screen," and the Court ultimately would decide the legal definition of the phrase. (Govt. Rep. to Mot. to Strike at 4.)

Appendix D

The government cites no authority supporting the proposition that the phrase "unobstructed views of the screen" has some sort of specialized legal meaning requiring expert testimony. This Court finds that it does not. The Court finds Mr. Harton's opinions admissible under Fed. R. Evid. 701 ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of . . . a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.") Fed. R. Evid. 701. Mr. Harton is Cinemark's Vice President of Design and Construction and states, based on the as-built reviews of the theaters provided to the DOJ and his personal visits to many of Cinemark's theaters, that all of Cinemark's theaters afford wheelchair patrons unobstructed views of the screen. This is appropriate summary judgment evidence.

If the government believes that Mr. Harton's observations are incorrect or that some or all of Cinemark's theaters fail to afford wheelchair patrons "unobstructed views of the screen," then it is the government's obligation to come forward on summary judgment with evidence sufficient to create an issue of fact on that point. The government, however, does not point to any evidence indicating (indeed, the government does not argue) that some or all of Cinemark's stadium-style theaters provide wheelchair seating with obstructed views of the screen under any interpretation of the phrase. Thus, the government has not met its burden on summary judgment of demonstrating a genuine issue for trial on the question of obstruction.

Appendix D

In that the government has not come forward with evidence sufficient to show that the wheelchair seating in any of Cinemark's theaters suffers from an obstructed view, this Court finds summary judgment in Cinemark's favor appropriate under *Lara* as to all of Cinemark's theaters where the wheelchair seating is located amidst seating for the general public. These theaters meet the criteria held by the Fifth Circuit in *Lara* to satisfy Title III of the ADA and include all of Cinemark's theaters except the nine multiplexes, or 52 auditoria, which Mr. Harton states position wheelchair seating in the first row of the movie theater *adjoining* general public seating. (*See* Harton Aff. ¶ 7.) With respect to these nine multiplexes, Cinemark acknowledges that the wheelchair seating is not located "amidst" general public seating as found in *Lara*. And Cinemark states:

> The fact that wheelchair seating in these [52] auditoria adjoins general public seating but is not located amidst public seating implicates dicta in *Lara* that admittedly creates some ambiguity as to whether deferring to *Lara* would be dispositive as to these auditoria.

(Cinemark Mem. at 11, n. 3.) Cinemark asserts, however, that the "amidst-adjoins distinction is immaterial" and summary judgment is appropriate with respect to these nine multiplexes because the Fifth Circuit held in *Lara* that the phrase "lines of sight comparable" in Section 4.33.3 did not require anything more than that theaters provide wheelchair-bound patrons unobstructed views of the screen. *Id.*

Appendix D

While the Court recognizes that the government asserts violations of the comparable lines of sight requirement *and* the "integral part of any fixed seating plan" requirement of Section 4.33.3 in this case (whereas the plaintiffs in *Lara* apparently alleged only a violation of the lines of sight requirement), the Court does not fired the "amidst-adjoins" distinction material. The government does not address the distinction in its opposition brief, and does not argue or explain how the distinction is relevant to any of the claims its alleges here. Accordingly, the Court finds summary judgment in Cinemark's favor appropriate as to all of its stadium-style theaters, including its theaters where the wheelchair seating is located in the first row of the theater adjoining general public seating.

Conclusion

For the reasons stated above, Plaintiffs' motion for partial summary judgment (docket no. 78) is DENIED. Defendant's Second Motion for Summary Judgment (docket no. 70) is GRANTED.

IT IS SO ORDERED.

s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: November 19, 2001

APPENDIX E — EXCERPTS FROM BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* IN *LARA v. CINEMARK USA, INC.*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

CIVIL ACTION NO.
EP-97-CA-502-H

CHIEF JUDGE HARRY LEE HUDSPETH

JOSÉ G. LARA, E.J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECH, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, and MYRA MURILLO,

Plaintiffs,

v.

CINEMARK USA, INC.

Defendant.

BRIEF OF *AMICUS CURIAE* UNITED STATES ON SUMMARY JUDGMENT ISSUES

* * *

Appendix E

II. STATEMENT OF FACTS

* * *

4. The Society of Motion Picture and Television Engineers ("SMPTE") has issued engineering guidelines for theater design, "SMPTE Engineering Guideline Design of Effective Cine Theaters, EG 18-1994" ("SMPTE Guideline") (attached hereto as Exhibit 3). Among other things, the SMPTE Guideline describes "line of sight" as the measurements, expressed in degrees of angles, of the viewer's horizontal and vertical field of vision to the viewing screen. The verticle viewing angle is the angle formed by the intersection of a line horizontal with eye level (a straight-ahead view) and a line from eye level to the top of the viewing screen.

* * *

5. The SMPTE guideline, based on anthropometric data and numerous studies, establishes that physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds +35 degrees, while the vertical range of "easy head movement" is +30 degrees. Exhibit 3 and 1-5. Physical discomfort also occurs when the horizontal line of sight exceeds +15 degrees in either direction. Exhibit 3 at 5.

* * *

7. . . . Consistent with this practical definition, the Department of Justice interprets the language in the Standards requiring "lines of sight comparable to those for members of

the general public" to mean that in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt. Wheelchair locations should not be relegated to the worst sight lines in the building, but neither do they categorically have to be the best. Instead, consistent with the overall intent of the ADA, wheelchair users should be provided equal access so that their experience equates that of members of the general public.[3] In other words, to ensure that wheelchair users are provided lines of sight that are comparable to the viewing angles offered to the general public, the lines of sight provided to wheelchair users should not be on the extremes of the range offered in the stadium. As described in the industry guidelines, "viewing angles" refers to vertical viewing angles, horizontal viewing angles and to other components that affect "lines of sight." *See* Exhibit 3 at 1-5.

* * * *

3. *See* 28 C.F.R. Part 36, §§ 36.202, 36.203, 36.302 (As a general rule, the objective of Title III is to provide persons with disabilities who utilize public accommodations with an experience that is functionally equivalent to that of other patrons); *see also* discussion of § 302 *supra*, at 6.

APPENDIX F — EXCERPTS FROM MEMORANDUM OPINION AND ORDER REGARDING APA COUNTERCLAIM IN *UNITED STATES OF AMERICA v. CINEMARK USA, INC.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1.99 CV 0705

JUDGE DONALD C. NUGENT

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINEMARK USA, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Plaintiff United States of America's Motion to Dismiss Defendant Cinemark's Counterclaim (Doc. #20). For the reasons stated below, Plaintiff's Motion to Dismiss Defendant's Counterclaim is GRANTED.

* * *

Appendix F

Plaintiff argues that its *amicus* brief and subsequent letters do not constitute final agency action. Defendant responds that the DOJ's enforcement actions, correspondence to Defendant and others that they comply with the ADA, and several *amicus* briefs constitute final agency action. Because they do not meet the requirements of finality Plaintiff's filing of complaints in their enforcement actions; correspondence discussing settlement or alleged violations of the ADA; and, *amicus* briefs are not "final" agency actions.[5]

* * * *